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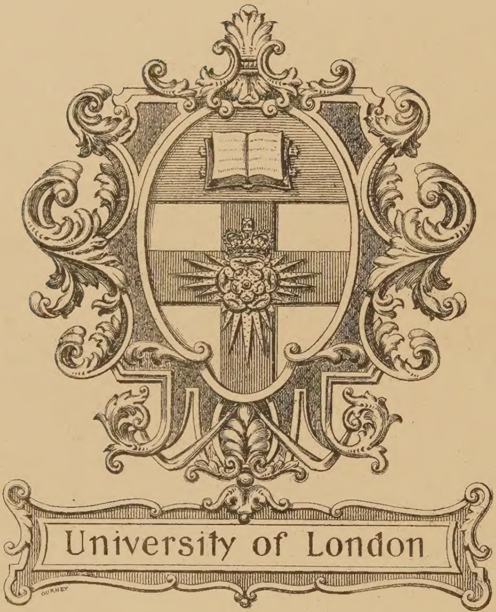
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1944

THE
LAW REPORTS
OF THE INCORPORATED COUNCIL OF LAW REPORTING.

CHANCERY DIVISION
AND CASES IN
LUNACY
AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL.

◆

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re MAY.

COCKERTON *v.* JONES.

UTHWATT J.

1943

Oct. 6.

Will—Construction—Gift to class—Gift over if no child attains twenty-one—Confirmation of will by codicil—Death of child between dates of will and codicil, after attaining twenty-one—Validity of ultimate gift.

A testator, who died in 1920, directed his trustees to stand possessed of certain shares in a company forming part of his residuary estate in trust to pay the dividends to his five nieces in equal shares for their lives, and he further directed that, after their death, subject to life interests to their husbands (if any) and to powers of appointment among issue, each of their shares should be held " if there shall not be any child of such niece who " being a son shall attain the age of twenty-one years or being a " daughter shall attain that age or marry under that age " in trust for her next of kin.

By two codicils dated, respectively, November 28, 1918, and March 13, 1920, the testator, so far as is material, confirmed his will.

A son of one of the nieces attained the age of twenty-one years between the date of the will and the dates of the codicils and died unmarried in 1916 :—

Held, that there was no reason for including the son who had attained twenty-one among the class specified in the direction and that the ultimate trust in favour of the next of kin was effective.

Brookman v. *Smith* (1872) L.R. 7 Ex. 271 considered.

ADJOURNED SUMMONS.

A testator, who died on March 17, 1920, made a will, dated August 7, 1913, and confirmed it, so far as is material, by two codicils, dated November 28, 1918, and March 13, 1920. By his will he directed that his trustees should stand possessed

UTHWATT J.

1943

MAY, *In re.* COCKERTON *v.* JONES.

of his residuary estate in trust for his five nieces in equal shares, and that any shares in John May & Co., Ld., which in the division of his residuary estate might form part of the share of any niece should be held in trust to pay the dividends to the respective nieces for their lives, and, after their death, to their surviving husbands, if any. Subject thereto he gave to each niece a power of appointment among her issue. The testator then directed as follows: "and in default of "appointment and subject to any partial appointment in "trust for the child if only one or all the children if more "than one of such niece who either before or after her death "shall being a son or sons attain the age of twenty-one years "or being a daughter or daughters attain that age or marry "under that age such children if more than one to take in "equal shares and if there shall not be any child of such "niece who being a son shall attain the age of twenty-one "years or being a daughter shall attain that age or marry "under that age then in trust for such person or persons as "would at her death have been her next of kin entitled as "such to her personal estate under the statutes for the "distribution of the personal estate of intestates" in manner therein mentioned. One of the five nieces of the testator, Leila Mary Allen, who died on January 30, 1943, was married once only to Gilbert Allen, who predeceased the testator, and she had one child only, Geoffrey May Allen, who was born on April 14, 1894, and died a bachelor on September 2, 1916, having, therefore, attained the age of twenty-one years between the date of the will and the dates of its confirmation by the two codicils. Two of the executors of the will of the testator took out a summons to determine whether, having regard to the fact that the only child of Leila Mary Allen attained the age of twenty-one years but died without issue in the lifetime of the testator, her settled share in the residuary estate, consisting of shares in the company, had been since her death and was held in trust for her personal representative, and formed part of her estate, or for the persons entitled under the ultimate trust in favour of her statutory next of kin.

Wilfrid Hunt for the applicants.

Winterbotham for the legal personal representative of the testator's niece, Leila Mary Allen. The gift to the next of kin fails and the share of this niece remains vested in her, since she had a son who attained the age of twenty-one. The word

UTHWATT J.

1943

MAY,
In re.
COCKERTON
v.
JONES.

"shall" in the will does not imply futurity, but means "if "there be not at any time any child of Leila who attains "twenty-one." *Brookman* v. *Smith* (1); *Tarbuck* v. *Tarbuck* (2). See also Jarman on Wills, 7th ed., p. 2137; and *In re Tredwell* (3). The general confirmation of the will by the codicils does not affect this disposition. The case is governed by *Brookman* v. *Smith* (1).

Droop, for next of kin, was not called on to argue.

UTHWATT J. The question which I have to determine is a short one of the construction of a form of will which is in common use. To my mind *Brookman* v. *Smith* (1), however interesting it may be as an application of well-known rules of construction, lays down no principle which I must follow here. One has throughout to bear in mind the confirmation of the will by the two codicils. At the date of the last codicil Geoffrey had attained the age of twenty-one years and was already dead. Leaving out of consideration the power to appoint to issue, there is here, in substance, an alternative gift. If there are children who being sons attain twenty-one or being daughters attain that age or marry, then such children are to take. If there are no children who being sons attain twenty-one or being daughters attain that age or marry, then the share goes to a different class. What the testator obviously intended to do and has done is to provide for the disposition of his property in two alternative events. The only persons who could take under the gift in default of appointment could not include the son Geoffrey, because he was dead. What reason is there for including him among the class to be considered in determining whether or not the second gift is to take effect? In my opinion, none. To my mind, the intention of the testator is clear, and the expression of that intention is no less clear. I, therefore, propose to declare that, on the true construction of the will and in the events which have happened, the ultimate trust in favour of the next of kin is effective.

Solicitors: *Withers & Co.; Maude & Tunnicliffe, for Louch, Belcher & Co., Newbury.*

J. L. D.

(1) (1872) L. R. 7 Ex. 271.
(2) (1834) 4 L. J. Ch. 129.
(3) [1891] 2 Ch. 640.

COHEN J.

1943

June 29.

In re LORD WESTBURY'S SETTLEMENT.

WESTMACOTT *v.* BETHELL.

Settlement—Annuity—Arrears—Application of income—Reduction in arrears.

The trustees of a settlement, dated September 23, 1925, and made by a settlor who died on February 21, 1930, were directed to stand possessed of certain shares in trust to pay to the settlor's wife and daughter-in-law "the clear sum of 500*l.* a year" each. After 1929 the income of the fund was insufficient to satisfy the annuities. From time to time sums were paid to the annuitants on account of the arrears, but, at the date of the death of the settlor's widow, on January 8, 1941, arrears amounting to over 2000*l.* were due to each annuitant. A summons having been taken out by the trustees to determine the method of payment of these arrears, Farwell J. held that they were charged on and payable out of the capital of the fund. A further question then arose whether the income of any particular year was to be applied in the discharge of the longest outstanding arrears or in or towards the payment of the current annuity of the surviving annuitant :—

Held, that the income available at the end of each trust year should be applied in the payment of the annuity payable in respect of that year ; that any deficiency should be made up out of capital ; and that the payments made on account should be treated as having been made in the first instance in satisfaction of the annuities becoming due during the current year and that the surplus only should be treated as having been used in payment off of the arrears, the earliest arrears being paid off first.

In re Croxon [1915] 2 Ch. 290, applied.

ADJOURNED SUMMONS

The facts and questions raised by the summons are sufficiently stated in the headnote.

H. H. King for the applicants.

A. C. Nesbitt for the surviving annuitant.

Vanneck for legal personal representatives of the settlor's widow.

Belsham for another party interested under the settlement.

J. H. Stamp for the Attorney-General.

COHEN J. In so far as the arrears may come out of corpus, it is not disputed that, in accordance with the provisions of r. 21 of the All Schedule Rules in the Income Tax Act, 1918, tax must be deducted at the standard rate in force at the time when the payment is made, but it is said on behalf of the surviving annuitant that she does not wish the arrears to be paid out of corpus, but would prefer that they should be paid, as and when possible, out of income from the fund, with the result that, although the fund out of which the arrears would be paid would have suffered tax at the rate of 10*s.* in the pound, the trustees, on making payment to her would, having regard to the terms of r. 19, only be entitled to deduct tax at the rate in force at the time when the arrears which were being paid had accrued. That attitude is not supported either by the trustees or by any of the other persons interested in the trust fund who are before the court, and, in my opinion, the trustees are right in saying that the proper course for them to adopt is to satisfy the arrears out of corpus.

It is clear from *In re Croxon* (1) that the proper course is to treat the annuity as payable annually, and, at the end of each trust year, to apply the income which is available in paying the annuity due in respect of that year, and, if there is a deficiency, to make it up out of corpus, starting de novo with the next year, and without any right (a point which does not, however, arise in this case) to resort to the future income to recoup the capital. If I were to accede to the argument of the surviving annuitant, the only result would be that, instead of keeping down the arrears, I should pile them up, and in those circumstances I think I must certainly accept the suggestion that it is the duty of the trustees to pay off these arrears out of capital. It remains to be seen whether or not the fund will be exhausted.

With regard to the method of dealing with the payments made on account, two alternative suggestions were made. It was suggested, on behalf of the legal personal representatives of the widow, that a sort of analogy to the rule in *Clayton's case* (2) should be applied, and that I should direct that each payment should be treated as having been made in satisfaction of the earliest portion of the arrears. On the other hand, on behalf of persons interested in corpus, it was argued that, having regard to the decision in *In re Croxon* (1), this would not be right. I am not suggesting any dereliction of duty on

(1) [1915] 2 Ch. 290.

(2) (1816) 1 Mer. 572.

COHEN J.

1943

LORD WESTBURY'S SETTLEMENT, *In re.* WESTMACOTT *v.* BETHELL.

the part of the trustees, who appear to have consulted the beneficiaries throughout, but, had the strict rule been complied with in accordance with the order of Farwell J., the arrears would in each year have been made good out of capital, and the income of the subsequent year would have been applied in paying the annuity of the current year before any balance thereof could be available for wiping out the arrears. I propose, therefore, to direct that the payments made to the annuitants on account should be treated as having been made in the first instance in satisfaction of the annuity becoming due during the current year, and that the surplus only should be treated as having been used in payment off of the arrears. In so far, however, as it is so applied, I think that the analogy to the rule in *Clayton's case* (1) should be applied, and the earliest arrears should be paid off first.

Solicitors: *Tylee & Co.; Rooper & Whately; Solicitor of Inland Revenue.*

J. L. D.

SIMONDS J.

1943

May 24.

In re ST. JAMES' COURT ESTATE, LIMITED.

Company—Scheme of arrangement—Proposed conversion of issued into redeemable preference shares—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 46, *sub-s.* 1.

By s. 46, sub-s. 1, of the Companies Act, 1929: "Subject to "the provisions of this section, a company limited by shares may, "if so authorised by its articles, issue preference shares which "are, or at the option of the company are to be liable, to be "redeemed . . . ."

The company petitioned the court to sanction a scheme of arrangement under which its issued preference shares were to be converted into redeemable preference shares:—

Held, that the conversion of issued preference shares into redeemable preference shares was not authorized by s. 46, sub-s. 1.

PETITION to sanction scheme of arrangement.

St. James' Court Estate, Ltd., was incorporated in 1927. Its capital was 425,000*l.*, divided into 200,000 6½ per cent. cumulative preference shares and 225,000 ordinary shares of

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(1) 1 Mer. 572.

SIMONDS J.

1943.

ST. JAMES' COURT ESTATE, LD., *In re.*

1*l.* each, all of which were issued and fully paid, the preference shares having priority as to capital and dividend. No dividend had been paid since July 1, 1939. The scheme provided that the company should pay to the holders of the preference shares a dividend of 11½ per cent. less tax, amounting to 23,000*l.* gross, and that the remainder of the arrears of preference dividend should be cancelled; that the preference shares should be converted into redeemable preference shares carrying a fixed cumulative preferential dividend at the rate of 5½ per cent.; that the ordinary shareholders should contribute 30,000 ordinary shares (two-fifteenths of their holding) for distribution among the preference shareholders; and that the articles of association should be altered to give effect to the scheme. On April 29, 1943, separate meetings of preference and ordinary shareholders were held to consider the scheme, and at both meetings large majorities voted in favour of it. At an extraordinary general meeting held on the same date, two special resolutions were passed, one approving the scheme, and the other, which was conditional on the scheme being sanctioned by the court, altering the articles of association. By the petition the company asked that the scheme might be sanctioned, and that, if necessary, the alteration in the capital of the company which was involved in the scheme should be confirmed, and approved by the court.

Christie K.C. and *T. D. D. Divine* for the company. The court has power to sanction the scheme. The proposed transaction amounts, not to a conversion, but to a surrender of the 6½ per cent. preference shares in exchange for the 5½ per cent. preference shares to be issued by the company and for 30,000 ordinary shares which are to be proportionately distributed. In effect, the capital will not be reduced, for it will be immediately increased to its original amount. If, however, there will technically be a reduction, it will be one which has been authorized by the special resolution of April 29, 1943. The company will not be purchasing its own shares and, therefore, the transaction will not be ultra vires: *Rowell* v. *John Rowell & Sons, Ltd.* (1); *Kirby* v. *Wilkins* (2). See also *In re Ellenroad Ring Mill, Ld.* (3) where the vice-chancellor, in the court of the county palatine of Lancaster, sanctioned a like scheme.

(1) [1912] 2 Ch. 609.

(2) [1929] 2 Ch. 444.

(3) (1942) 86 Sol. Jour. 235.

SIMONDS J.

1943

St. James' Court Estate, Ld., *In re.*

Simonds J. I am not prepared to sanction the scheme as it stands. The conversion of issued preference shares into redeemable preference shares seems to me to be clearly not within s. 46, sub-s. 1. A conversion of that kind can take place only if the steps appropriate to a reduction and simultaneous increase of capital have been taken, and the resolution of April 29, 1943, approving the scheme, was not a proper resolution for that reduction and increase. There ought not to be any difficulty in going before the registrar with proper resolutions for reduction and increase of capital. If the necessary resolutions are passed for the reduction of the capital by cancelling the 200,000 issued preference shares and for a simultaneous increase of it by creating 200,000 redeemable preference shares of 1*l.* each, I will then consider whether I will sanction the scheme. Meanwhile, I will adjourn the petition so that the company may have an opportunity to submit resolutions of that kind to its members.

Solicitors: *Barnett, Tuson, Hood & Co.*

K. R. A. H.

UTHWATT J.

1943

Oct. 19.

In re DONN.

DONN *v.* MOSES.

Will—Conditions subsequent—Forfeiture clause—Validity—Prohibition of marriage with "anyone not of the Jewish faith" or "whose "parents were not of the Jewish faith."

A testator, who settled shares of his residuary estate on his children for life and then to his grandchildren, provided by his will that, if any child of his should marry "any one not of the "Jewish faith," or "whose parents were not of the Jewish faith "at the time of the birth of the person so intermarrying," or who should "at any time previous to such marriage have been of any "faith other than the Jewish faith," the child so marrying should forfeit one-half of the income of his or her share, which was then given over upon other trusts:—

Held, that the provision was void for uncertainty.

Dicta of the majority of the House of Lords in *Clayton* v. *Ramsden* [1943] A. C. 320, applied, and *In re Blaiberg* [1940] Ch. 385 followed.

Adjourned summons.

By his will, dated April 4, 1921, the testator, Joseph Donn, settled shares of his residuary estate on his children during their lives and subject thereto for their children. Clause 17 of the will provided: "If any child of mine shall intermarry with "anyone not of the Jewish faith, or if any child of mine shall "intermarry with anyone whose parents were not of the "Jewish faith at the time of the birth of the person so inter-"marrying with any child of mine, or if such last-mentioned "person shall at any time previous to such marriage have been "of any faith other than the Jewish faith then and in any and "every such case during the life of such child one-half part of "the income of the share of such child shall be held upon the "trusts" subsisting in respect of the shares given to the testator's other children. The testator died on June 18, 1921, and his will was duly proved. Two of his sons, Jonas and Marcus, married persons not of the Jewish faith. The trustees treated the condition as being valid until 1943 when they took out the present summons asking whether the condition was valid, or void, or failed for uncertainty or for any other reason.

G. D. Johnston for the trustees.

Michael Bowles for one of the children of the testator who had married a person of the Jewish faith. The forfeiture clause is valid. The decision in *Clayton* v. *Ramsden* (1) is distinguishable. Here the condition does not require marriage to a person of Jewish parentage, and it was that condition which the House of Lords in *Clayton* v. *Ramsden* (1) held to be invalid for uncertainty. Even if the first part of the clause is too uncertain, the final words "if such . . . . person shall at any "time previous to such marriage have been of any faith other "than the Jewish faith" are capable of being definitely ascertained. *In re Blaiberg* (2) was reversed by the Court of Appeal in *In re Samuel* (3) and was not definitely dealt with by the House of Lords in *Clayton* v. *Ramsden* (1). The least degree of adherence to the Jewish faith is sufficient to satisfy the condition.

Hillaby for another child in the same interest.

J. A. Reid, H. Rose, and *Cecil Turner,* for the defendants, Jonas Donn, Marcus Donn and their children, were not called on.

(1) [1943] A. C. 320.
(2) [1940] Ch. 385.
(3) [1942] Ch. 1.

UTHWATT J. The test which I have to apply to ascertain whether or not the provision in cl. 17 of the will is void for uncertainty is that stated by Parker J. where he, in *In re Sandbrook* (1), says: "as has been laid down by the House of "Lords in the case of *Clavering* v. *Ellison* (2), conditions subse-"quent, in order to defeat vested estates, or cause a forfeiture, "must be such that from the moment of their creation the court "can say with reasonable certainty in what events the for-"feiture will occur." That is to say, there must be reasonable certainty with regard to all the possible events in which a forfeiture can take place. The question of the validity of conditions relating to marriage within the Jewish faith came up for decision in *In re Blaiberg* (3), where Morton J. decided that the provision in a codicil that "should any child or grandchild "of mine" (that is, of the testator) "marry any person not of "the Jewish faith, such child or grandchild shall forfeit" etc., was void for uncertainty. Much the same point came up for decision in *Clayton* v. *Ramsden* (4), where the House of Lords had to consider the question of a condition of forfeiture depending on marriage with a person not of Jewish parentage and of the Jewish faith, and that condition was held to be void for uncertainty. All the Law Lords who took part in the decision of that case were agreed that that part of the condition which related to "Jewish parentage" was void for uncertainty and by way of dictum there are to be found certain expressions of the views of the Law Lords on that part which dealt with "Jewish faith." Lord Atkin and Lord Thankerton agreed with the view expressed by Lord Romer. Lord Russell gave his view in these words (5): "In these circumstances it is "unnecessary to express an opinion on the certainty of the "words 'of the Jewish faith,' but, had it been necessary, I "should have felt a difficulty in holding that their meaning was "clear or certain. It seems to me that (apart from the "difficulty which arises from the existence of the three "varieties of Judaism referred to by the Master of the Rolls) "the testator has given no indication of the degree of attach-"ment or adherence to the faith which he requires on the part "of his daughter's husband. The requirement that a person "shall be of Jewish faith seems to me too vague to enable it to "be said with certainty that a particular individual complies

(1) [1912] 2 Ch. 471, 477.

(2) (1859) 7 H. L. C. 707, 725.

(3) [1940] Ch. 385.

(4) [1943] A. C. 320.

(5) [1943] A. C. 328.

"with the requirement. The decision of Morton J. in *In re* "*Blaiberg* (1), though seemingly based on the difficulty of "ascertaining the state of a man's mind, may well stand on "the ground of the uncertainty of the words there in "question." Lord Wright, in his opinion, said that, having regard to the conclusion at which he had arrived on the words "Jewish parentage," it was unnecessary to express a final opinion on the words "of the Jewish faith," and continued (2): "As at present advised, I do not think they are of insufficient "clearness and distinctness. I am not impressed by the con- "tention that they refer to a state of mind or of religious "conviction which is incapable of proof. States of mind are "capable of proof like other matters of fact. Courts of law "and equity have to decide questions of fraudulent intent or "the like. I do not understand that the rule in *Clavering* v. "*Ellison* (3) deals with questions of proof, but solely with the "clearness and distinctness of the language used in the clause, "that is, its capability of defining precisely a specific state of "fact. I do not see why 'Jewish faith' should not connote a "specific fact equally with 'Christian faith.' The latter is an "all-embracing term which includes many possible varieties "—Roman Catholic, Anglican, Presbyterian, Lutheran and "others. There are many mansions, but they are all included "in one house. I should not be disposed to regard 'Christian "faith' as a phrase lacking in clearness and distinctness, and I "see no reason in principle why 'Jewish faith' is not sufficiently "clear and distinct to identify a specific set of facts to which "it may be applied." Clearly Lord Wright had no doubt in his mind of the certainty of the expression "Jewish faith." Lord Romer was equally clear the other way. He said (4): "Even if the clause could be read as though it merely provided "for a forfeiture in the event of the daughter being married to "a man not of the Jewish faith, I am of opinion that it would "still be void for uncertainty. For how is it to be ascertained "whether a man is of the Jewish faith? The Court of Appeal "answered this question by saying that whether a man was or "was not of the Jewish faith was a mere question of fact to be "determined on evidence, and that the assertion by the man "that he was of that faith was well nigh conclusive. I should "agree entirely with the Court of Appeal as to this if only I "knew what was the meaning of the words 'of the Jewish

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(1) [1940] Ch. 385.
(2) [1943] A. C. 331.
(3) 7 H. L. C. 725.
(4) [1943] A. C. 334.

UTHWATT J.

1943

DONN, *In re.* DONN *v.* MOSES.

" 'faith.' Until I know that I do not know to what the "evidence is to be directed. There are, of course, an enormous "number of people who accept every tenet of, and observe "every rule of practice and conduct prescribed by, the Jewish "religion. As to them there can be no doubt that they are of "the Jewish faith, but there must obviously be others who do "not accept all those tenets and are lax in the observance of "some of those rules of practice and of conduct, and the "extent to which the tenets are accepted and the rules are "observed will vary in different individuals. I do not doubt "that each of these last-mentioned individuals, if questioned "would say, and say in all honesty, that he was of the Jewish "faith. On the other hand, I do not doubt that one who "accepted all the tenets and observed all the rules would "assert that some of the individuals I have mentioned were "certainly not of the Jewish faith. It would surely depend on "the extent to which the particular individual accepted the "tenets and observed the rules. I cannot avoid the conclusion "that the question whether a man is of the Jewish faith is a "question of degree. The testator has, however, failed to give "any indication what degree of faith in the daughter's husband "will avoid, and what degree will bring about, a forfeiture of "her interest in his estate. In these circumstances the "condition requiring that a husband shall be of the Jewish "faith would, even if standing alone, be void for uncertainty. "I would allow this appeal."

The statements in the House of Lords in *Clayton* v. *Ramsden* (1) are dicta, and, as such, not binding, but I am bound to pay all respect to them. I see no reason for not adopting the view expressed by Lord Romer in his speech.

This will does not, in my opinion, differ in any material respect from the will which Morton J. had to consider in *In re Blaiberg* (2). It was argued strenuously by Mr. Michael Bowles and Mr. Hillaby that it is possible to get from this will an expression of the testator's idea of what he means by being "of the Jewish faith." They were obviously directing their remarks to the language used by Lord Romer in his speech in *Clayton* v. *Ramsden* (1), in which he based his view on the ground that the testator there had not indicated what degree of faith the daughter's husband should have in order to bring about the position in which she would not have an interest in the estate. The point of Lord Romer's observation is that one

(1) [1943] A. C. 320. (2) [1940] Ch. 385.

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could not tell from the will itself what the testator meant by "of Jewish faith," the words being themselves, without exposition, uncertain in their meaning. There was that uncertainty. In the present case there appears to be no doubt that no indication is provided of the degree of faith or degree of acceptance of the Jewish faith which the testator laid down. The first condition is: "If any child of mine shall intermarry "with anyone not of the Jewish faith." These are plain words. There is not in them any means of ascertaining what particular tenet a person must hold in order to be not of the Jewish faith. Then "or if any child of mine shall inter-"marry with anyone whose parents were not of the Jewish "faith at the time of the birth of the person so inter-"marrying." The same remark applies there. The third condition is "or if such last-mentioned person"—that means the person referred to, "the bride" as I will call her, under the second condition—"shall at any time previous to such "marriage have been of any faith other than the Jewish "faith then and in any and every such case," and so on. That is, in other words, "shall at any time have been of non-"Jewish faith." Despite the able argument of Mr. Bowles and Mr. Hillaby, I cannot get from that clause any reason for thinking that a test of adherence or non-adherence to the Jewish faith has been supplied by the testator in his will. If that be so, on the footing of the decision in *In re Blaiberg* (1) and my acceptance of the dicta of the majority of the House of Lords in *Clayton* v. *Ramsden* (2), I think this condition is void for uncertainty, and I so declare.

Solicitors: *Brown & Woolnough; Zeffertt, Heard & Morley Lawson.*

H. L. L.

SCHERING, LIMITED *v.* STOCKHOLMS ENSKILDA BANK AND OTHERS.

C. A.

1943

July 19, 20, 21, 23; *Oct.* 12.

Contract—Illegality—Abrogation—Outbreak of war—Intercourse with, or benefit to, the enemy—Purchase of reichsmarks by German company from Swedish bank—Repayment of debt by British company by instalments in consideration of assignment by Swedish bank of like amount of German company's debt.

By a contract made in February, 1936, a German company agreed to purchase from a Swedish bank reichsmarks to the value

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(1) [1940] Ch. 385.

(2) [1943] A. C. 320.

C. A.

1943

SCHERING, LD. v. STOCKHOLMS ENSKILDA BANK.

of 84,000*l.*, payment therefor to be postponed for eight years and an English company as surety guaranteed the payment. By a letter dated April 16, 1936, addressed to the Swedish bank the English company again guaranteed the debt and undertook as a principal to pay it off by instalments in consideration of the assignment to it by the bank on the occasion of each such payment of a like sterling amount of the bank's claim against the German company. The letter provided that the agreement therein contained was made in accordance with the laws of England. By another document of the same date the English company created a security for the performance of their contract. A number of instalments had been paid before the outbreak of war with Germany :—

Held, that the principle by which a state of war abrogates and puts an end to all executory contracts between a British subject and an enemy which for their further performance require commercial intercourse between the British subject and the enemy does not apply to a contract between a British subject and a neutral, unless it be clearly shown by those who impugn the contract that its performance will in fact enhance the resources of the enemy or at least that there is a substantial probability that that will be the case ; and that, payments under the contract in the present case being suspended during the war (see *Stockholms Enskilda Bank Aktiebolag* v. *Schering, Ld.* [1941] 1 K. B. 424), there was no such prospect of benefit to the enemy during the war as to necessitate the abrogation of the contract.

Ertel Bieber & Co. v. *Rio Tinto Co., Ld.*, [1918] A. C. 260, and *In re Badische Co., Ld.* [1921] 2 Ch. 331 discussed and distinguished.

Decision of Simonds J. reversed.

APPEAL from Simonds J.

A contract dated February 28, 1936, described in the translation from the German original as a " contract of debt," was entered into between the defendants, Stockholms Enskilda Bank Aktiebolag ; a German company, Schering-Kahlbaum Aktiengesellschaft, the parent company of the plaintiffs, Schering, Ld. ; and the plaintiffs and an Indian company as sureties. Under this contract the bank undertook to place at the disposal of the German company reichsmarks to the value of 84,000*l.* sterling in consideration of which the German company would be indebted to the bank in the sum of 50,400*l.* sterling, the debt to fall due and be repaid on the expiration of eight years from the date of payment of the reichsmarks, the plaintiffs and the Indian company constituting themselves jointly and severally sureties for the German company. By cl. 4 the sureties were to acquire from the bank its claims against the German company by instalments, the first to be paid on October 28, 1937, and the last on April 28, 1944. The first four instalments were to be of 6,300*l.* each, and then the amounts of the instalments diminished, the last two being of 1680*l.* each. It was further provided by cl. 4 that "if and "to the extent that the sureties do not acquire the claim at "the dates specified, the remission (i.e., from 84,000*l.* to "50,400*l.*) shall . . . . lapse rateably in respect to that amount "of debt which remains in relation to Enskilda after setting "off any payments which have been made." By cl. 7 the bank was to call in the debt immediately if the German company or one of the sureties became bankrupt. By cl. 8 the contract of debt was to be governed by German law, but the contract between the bank and the sureties by English law. In April, 1936, the bank obtained from the plaintiffs and the Indian company a further document, described as the "April contract," by which the plaintiffs and the Indian company jointly and severally guaranteed, as a continuing guarantee, the payment in sterling by the German company of 50,400*l.* It was further provided that all payments received by the bank from the German company should be taken in reduction of the liability of the sureties. The sureties also jointly and severally undertook as principals, and not as guarantors, to make the payments therein set out in consideration of the assignment by the bank to them on the occasion of each such payment of a like sterling amount of the bank's claim against the German company. The payments by instalments were set out in the same manner as in the February contract, each payment to be a satisfaction pro tanto of the liability of the sureties under the guarantee, and default in payment of any one instalment was not to accelerate the date for payment of any other instalment. The German company were not parties to this contract, which, it was provided, was made in accordance with English law. On the same date a further document, described as the "April letter," was addressed by the plaintiffs to the bank confirming that they had pledged certain goods to the bank as security for their liability whether as guarantors or principals. When the action was brought these goods were represented by the sum of 25,000*l.* sterling standing in the names of the defendants, Edwards and Morris. On October 28, 1937, April 28 and October 28, 1938, and April 28, 1939, the first four instalments were paid by the plaintiffs or the Indian company, and in each case an assignment was made to them of the sum of 6300*l.* "out of the claim of the bank against the German

C. A.

1943

Schering, Ld. v. Stockholms Enskilda Bank.

"company." War having broken out between Great Britain and Germany on September 3, 1939, the plaintiffs declined to pay any further instalments under the contracts, and, in June, 1941, they passed a resolution for voluntary winding-up. In January, 1942, they began the present action, claiming against the bank a declaration that the April contract was no longer enforceable against them, on the grounds—(*a*) that the performance of the contract had become impossible or had been frustrated, (*b*) (by amendment at the trial) that it would enure for the benefit of the German company and to the detriment of the plaintiffs or would involve intercourse between the plaintiffs and the German company, and was, therefore, dissolved by the outbreak of war. Against the personal defendants, Edwards and Morris, the plaintiffs claimed release of the security and repayment of the 25,000*l.*

Simonds J., without expressing any opinion on the question whether the contract had been frustrated, held that performance of the contract involved intercourse with the enemy and that its continued existence conferred a benefit on the enemy, and consequently that the performance of the contract was not merely suspended but abrogated by the outbreak of war on September 3. He therefore made a declaration that the contract was abrogated at the outbreak of war and an order that the defendants, Edwards & Morris, subject to their retention of their costs thereout, should pay the plaintiffs the sum of 25,000*l.* and any interest accrued thereon.

The defendant bank appealed.

Scott Cairns and *Lindner* for the bank. The decision in *Stockholms Enskilda Bank Aktiebolag* v. *Schering, Ld.* (1) was based on the Trading with the Enemy Act, 1939, and affected only the payments falling due during the war. It did not affect the right of the bank to receive payment after the war. In the present action the plaintiffs issued their writ on the basis of frustration, but later, by amendment, alleged that the contract was discharged at common law by illegality based on an alleged rule of public policy that executory contracts which would benefit enemies are abrogated. That contention was accepted by Simonds J., but the result would be to deprive of their money the neutral bank which entered into this legitimate transaction. The essence of the transaction was to

(1) [1941] 1 K. B. 424.

get repayment from the English company, secured by a deposit of goods by them with the other defendants. The Swedish company has fulfilled its whole obligation by payment to the German company and the German company has received all the benefit it can receive, so the contract is not an executory contract (the assignment of the German debt being mere machinery to assist the English company), even if the rule were as Simonds J. has held. In truth, however, it is much narrower. While not limited to trading contracts, nor to contracts to which one party is an enemy, the rule applies only to executory contracts, and abrogation must not amount to a confiscation of accrued rights even against an enemy. *Ertel Bieber & Co.* v. *Rio Tinto Co., Ld.* (1), on which Simonds J. placed great reliance, has gone further than any other case in dissolving a contract on the outbreak of war, but it is distinguishable, and does not establish any general rule that a contract will be dissolved on the outbreak of war if it might confer a benefit on an enemy. Unless its continuance must involve intercourse with, or benefit to an enemy *during the war*, it will be suspended only, not dissolved. Here neither intercourse with nor benefit to the German company is involved till after the war, if at all, and there is no reason for abrogation. [The following cases on suspension and abrogation were referred to: *Janson* v. *Driefontein Consolidated Mines, Ld.* (2); *Schmitz* v. *Van der Veen & Co.* (3); *Distington Hematite Iron Co., Ld.* v. *Possehl & Co.* (4); *Halsey* v. *Lowenfeld* (5); *Daimler Co., Ld.* v. *Continental Tyre and Rubber Co., Ld.* (6); *Seligman* v. *Eagle Insurance Co.* (7); *Hugh Stevenson & Sons, Ld.* v. *Aktiengesellschaft für Cartonnagen-Industrie* (8); *In re Anglo-International Bank, Ld.* (9); *Veithardt & Hall, Ld.* v. *Rylands Bros., Ld.* (10); *In re Badische Co., Ld.* (11); *Tingley* v. *Müller* (12); which was distinguished in *Naylor Benzon & Co., Ld.* v. *Krainische Industrie Gesellschaft* (13).] Even in *Ertel Bieber & Co.* v. *Rio Tinto Co., Ld.* (14) the contract was only treated, in the speeches of Lord Dunedin and Lord Parker (15) as abrogated as to deliveries which must take place during the war. As to subsequent liabilities they applied the doctrine of frustration which rests on different principles, and the very fact that it was resorted to showed that their Lordships did not regard the contract as wholly abrogated by war.

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(1) [1918] A. C. 260.
(2) [1902] A. C. 484.
(3) (1915) 112 L. T. 991.
(4) [1916] 1 K. B. 811.
(5) [1916] 2 K. B. 707.
(6) [1916] 2 A. C. 307.
(7) [1917] 1 Ch. 519.
(8) [1918] A. C. 239.
(9) [1943] Ch. 233.
(10) (1917) 116 L. T. 706.
(11) [1921] 2 Ch. 331.
(12) [1917] 2 Ch. 144.
(13) [1918] 1 K. B. 331.
(14) [1918] A. C. 260.
(15) Ibid. 269, 283.

Macaskie K.C. and *J. A. Wolfe* (for *A. F. M. Berkeley* on war service) for the plaintiffs. It appears from the speech of Lord Dunedin in *Ertel Bieber & Co.* v. *Rio Tinto Co., Ld.* (1) that the policy of the law is to strike at all contracts which may benefit an enemy, whether he is a party or not, and even though the contract be made between British subjects, the right of the individual being subordinated to the interest of the country. That principle is subject to limited exceptions in the case of accrued rights and rights of property. Here the Swedish bank at the outbreak of war had no accrued rights against anyone, for nothing was owing to it. The continuance of this contract will involve benefit to the enemy. If the bank's claims against the English company are eventually met, the German company will get the benefit of the discount which it would lose in the event of permanent abrogation. The continued presence of the English surety is an improvement of German credit and resources during the war. [LORD CLAUSON. What principle of public policy is violated if a German who has hitherto been a debtor to a neutral bank becomes instead a debtor of a British subject ?] Apart from the benefit derived from the right to discount, the English company's security for 25,000*l.* is sterilized for an indefinite period. If the contract were made with a German creditor it would be abrogated. [LORD GREENE M.R. Yes, because an executory contract with an enemy necessarily improves his trading position. A contract with a neutral may benefit him, but is not necessarily therefore bad.] It does not seem possible, on the authorities, to submit that in no case can an executory contract which may benefit an enemy survive the outbreak of war. It is a question on which side of the line each case falls. They referred to *In re Badische Co., Ltd.* (2) ; *Schmitz* v. *Van der Veen* (3) ; *Stockholms Enskilda Bank* v. *Schering Ld.* (4) ; *Halsey* v. *Lowenfeld* (5) ; and to McNair on The Legal Effects of War, ch. 4. Alternatively, the contract is frustrated.

(1) [1918] A. C. 260.
(2) [1921] 2 Ch. 331, 373.
(3) 112 L. T. 991.
(4) [1941] 1 K. B. 424, 441.
(5) [1916] 2 K. B. 707.

Pennycuick for the other defendants.

Cairns replied.

Cur. adv. vult.

Oct. 12. LORD GREENE M.R. read the following judgment. I have the authority of Lord Clauson to say that he has read the judgment which I am about to deliver and agrees with it.

In the previous litigation between the present defendants (whom I will refer to as "the Swedish bank") and the plaintiffs, Schering, Ld., the Swedish bank was claiming payment of a sum of 3,360*l.*, being the amount of the instalment due to it on October 28, 1939, under the contract of April 16, 1936 (which I will refer to as "the April contract"). The action was dismissed with costs by Hawke J. and his judgment was affirmed on appeal by this court. The ground of the decision was that this payment under the April contract would be for the benefit of the Schering-Kahlbaum Aktiengesellschaft (which I will refer to as "the German "company") and was in consequence prohibited by the Trading with the Enemy Act, 1939. In the statement of claim delivered in the present proceedings, Schering, Ld. (now in liquidation) claimed that the April contract as a whole had become impossible of performance on the ground that all future payments during the war would be illegal under the Trading with the Enemy Act. In the alternative, they claimed that the April contract had been frustrated. They also claimed the release of a sum of 25,000*l.* standing in the joint names of the liquidator and the defendants, Arthur William Edwards and Henry Morris, which represents the security provided by Schering, Ld., in connexion with the April contract. During the course of the trial before Simonds J., Schering, Ld., raised an entirely new case. They applied for and obtained leave to amend their statement of claim by alleging that on the outbreak of the present war the April contract became contrary to public policy and unenforceable against them. On this argument they were successful and Simonds J. made a declaration that the April contract had been abrogated by the outbreak of war. He also made a consequential order for the release of the security. The case which thus succeeded before Simonds J. was not raised in the previous proceedings. It would have afforded a complete defence to those proceedings, yet neither was it

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mentioned in the defence nor was it raised by counsel (the late Mr. A. T. Miller K.C. and Mr. J. A. Wolfe) in the course of the argument. This is all the more striking when it is observed that a month before the issue of the writ in those proceedings Schering, Ld., themselves claimed in a letter to the Swedish bank that the April contract had been dissolved by the outbreak of war. This claim was not adopted by counsel who signed the defence in those proceedings. That defence was limited to an allegation that payment of the particular sum then in suit would be illegal under the Trading with the Enemy Act. I do not mention these facts as suggesting that the claim is not a good one. They do, however, show that it is certainly not one which obtrudes itself on the attention of experienced persons and that it calls for careful examination.

I can at this stage conveniently dispose of one argument raised by counsel for the Swedish bank. It was that some observations which I made in my judgment in the previous appeal were directed to the question of the continuing legality of the April contract and amounted at any rate to a dictum in his favour. This argument is entirely misconceived. The passage relied upon is as follows (1): " It is true that so far " as anything in this Act of Parliament is concerned, the prohibition of payment is a temporary one. It only exists so " long as the payee, or the person to receive the benefit, is " an enemy. If and when he ceases to be an enemy, and in " the absence of further legislation affecting his rights, he will, " according to ordinary principles, be entitled to receive the " benefit which was to flow to him under the machinery of " these agreements. At the moment, that benefit is prohibited, " and it seems to me that that circumstance in this case is a " defence to the action." As I have already said, the only argument raised in that case was that the payment in suit was prohibited by the Trading with the Enemy Act. My words were directed solely to the operation of that Act and the whole passage is clearly governed by the words in the opening sentence " so far as anything in this Act of Parliament is " concerned." What the position of the contract might be at common law was not a matter which was before the court.

In my judgment I set out at some length the history of the relationship between the parties and I summarized the terms of the relevant contracts. I do not propose to repeat what I then said. It will be sufficient to supplement my statement by adding to it in the course of this judgment certain particulars which are of importance in the present appeal. The instalment in question in the previous action was that falling due in October, 1939. The last instalment will become due in April, 1944. The effect of the payment of the instalments on the liability of the German company to the Swedish bank is explained in the report (1). One of the arguments addressed to us calls for an amplification of what I there said. The relevant provision is contained in cl. 4 of the contract of February 28, 1936 (to which I will refer as "the February "contract"). Under it, default by the guarantors in acquiring the debt of the German company at the dates specified for the payment of the instalments deprives the German company of the benefit of the discount so far as regards that part of the debt which remains to be acquired by the guarantors. Such default by the guarantors would, therefore, operate to the prejudice of the German company. A letter addressed by the Swedish bank to the German company and dated March 17, 1938, purported to place a special construction on cl. 4 of the February contract. Whatever the effect of this may be as between the Swedish bank and the German company, Schering, Ld., and the Indian company were not parties to it as they had been to the February contract itself. By this letter cl. 4 was to be understood to mean that the German company would only lose the benefit of the discount if the sureties failed to acquire the claim at the dates stated "and Enskilda is not "satisfied by payment by third parties or by execution on "the property of the sureties or in some other way in full, "that is to say, including all expenses incurred, if any." The significance which is attached to this letter on behalf of Schering, Ld., I will explain in due course. The security of which the release is claimed was provided by Schering, Ld., under the terms of a letter addressed to the Swedish bank and dated April 16, 1936. It originally consisted of goods to the value of at least 25,200*l*. which were pledged to the Swedish bank as security for the liability of Schering, Ld., whether as guarantors or as principals, under the April contract. The goods were to be kept warehoused in the name of the defendant, Edwards, as trustee. Schering, Ld., were to be entitled to sell the goods from time to time provided that the value of the goods pledged was kept up to the minimum value of 25,200*l*. As soon as instalments amounting to 28,560*l*.

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(1) [1941] 1 K. B. 424, 441.

(1) [1941] 1 K. B. 433.

(that is to say the first five instalments) had been paid, this minimum value was to be reduced to 21,840*l*.—the amount of the remaining instalments—and thereafter by amounts equal to the remaining instalments as and when they were paid. The obligations of Schering, Ld., under this agreement were to be determined when the liability for which the security was given had been discharged in full. The assets of Schering, Ld., have all been sold in the liquidation and the sum of 25,000*l*. has been placed in the joint names already mentioned to answer the obligations of Schering, Ld., under the letter of April 16, 1936.

These being the relevant facts, two questions only have been discussed before us. The first and most important is that decided by Simonds J. in favour of Schering, Ld., namely, whether on the outbreak of war the April contract became an illegal contract at common law. The second is whether in the events which have happened the April contract has been frustrated. No other ground was suggested for holding that the April contract has been abrogated. No relief is asked in respect of the February contract. The effect of war upon contracts between a British subject and an enemy has been discussed in a large number of authorities and the main principles governing it are well settled. The same is not true of the effect of war on contracts between a British subject and a subject of a neutral State. The only case of such a contract which was relied on was *Esposito* v. *Bowden*, (1), where performance of the contract necessarily involved trading with the enemy by a British subject and it throws no light on the questions which we have to consider. It is, of course, indisputable that on the outbreak of war between this country and another country a contract between a British subject and a neutral may be abrogated at common law. *Esposito* v. *Bowden* (1) is one example. Another obvious example would be where the contract provided in terms that goods supplied by the British subject to the neutral should be resold by the neutral to the enemy country. I will mention another example when I come to discuss *In re Badische Co., Ld.*, (2) later in this judgment. The questions immediately arise: What are the limits within which this rule operates, and what are the principles which underlie it?

There are, as it seems to me, two considerations to be borne in mind at the outset of the inquiry. The first is that the

(1) (1857) 7 E. & B. 763.

(2) [1921] 2 Ch. 331.

maintenance of commercial relations and the loyal performance of contracts with neutrals are matters which it is to the interest of this country to foster and encourage. From this it would appear to follow that in cases where the outbreak of war compels the common law to interfere with and control the performance of such contracts on the ground of public policy the measure of interference ought not to exceed what is required by the public interest in regard to the successful prosecution of the war. This leads me to the second consideration. In the case of contracts between a British subject and an enemy, " a state of war " (to use the words of Lord Dunedin) . . . . " abrogates and puts an end to all " executory contracts which for their further performance " require commercial intercourse between " the British subject and the enemy: see *Ertel Bieber & Co.* v. *Rio Tinto Co., Ld.* (1). Later in the same speech, Lord Dunedin, speaking of the judgment in *The Hoop* (2), says: " the ground of " judgment was that all trading with the enemy is unlawful at " common law as against public policy. Why? Not because " of the terms of the particular contract but because contract " in general might enhance the resources of the enemy or " cripple those of the subjects of the King" (3). Observations to the same effect are to be found in the speeches of Lord Atkinson (4) and Lord Sumner (5). In the case of a contract with a neutral this absolute rule against the maintenance of contracts clearly cannot apply. Trading and intercourse with a neutral are not unlawful at common law during times of war. Restrictions may, of course, be placed on such activities. Export of certain goods may, for example, be prohibited or restricted under war-time legislation so that the contract cannot be performed, but this is not to say that an executory contract with a neutral is made unlawful at common law. Again, a contract with a neutral is not abrogated on the ground that its performance or continued existence might tend to cripple the national resources. A contract to sell to a neutral essential goods in short supply might, if performed, have a serious effect on the ability of this country to provide itself with materials required for the prosecution of the war. It cannot surely be suggested that this circumstance will abrogate the contract. If it is desired to prevent the ill effects

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(1) [1918] A. C. 260, 267.
(2) (1799) 1 C. Rob. 196.
(3) [1918] A. C. 260, 273.
(4) Ibid. 277.
(5) Ibid. 291.

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which would follow from its performance that must be done by means of a prohibition against export or some means of that character. The common law is not effective for such a purpose.

There remains the case where the performance of a contract with a neutral " might enhance the resources of the enemy." In the case of a contract with an enemy there is no need to inquire whether this will be so in fact. The law assumes that it will be so and prohibits the performance of the contract accordingly merely because the contract is a contract with an enemy. " Trading with the subject of an enemy State, or " with a person resident in that State, is assumed to be " beneficial to the enemy State " : per Lord Atkinson in the *Ertel Bieber* case (1). No such consideration applies in the case of a contract with a neutral. No assumption can be made that such a contract might enhance the resources of the enemy. If such a contract is to be abrogated by the outbreak of war it can only be on the ground that its performance will in fact enhance the resources of the enemy or that at least there is shown to be a substantial probability that this will be the case. These are matters which must be established by those who impugn the contract. They are not to be assumed as matters of law although, of course, the provisions of the contract itself may settle the question. This conclusion, however, if it be correct, only takes us part of the way. In the case of an executory contract with an enemy it is not merely performance so long as the state of war persists that is prohibited. The whole contract is abrogated. The reason for this is that, even if performance were postponed until after the war, the mere existence of the contract during the war might benefit the enemy by, for example, improving his credit or assisting him in his prosecution of the war by the knowledge that after the war the contract will remain on foot for his benefit. In the *Ertel Bieber* case (1) the main argument turned on the effect of a suspensory clause. In spite of this clause intercourse with the enemy would still have been necessary during the war and this alone prevented it from having the effect of saving the contract, but the House of Lords dealt with the point on a wider ground and held that the clause was bad as being against public policy. Lord Dunedin pointed out (2) that the clause would operate to secure rights in the future by the maintenance of the commercial relation in the present, that it would hamper the trade of the British subject

(1) [1918] A. C. 260, 277. (2) Ibid. 275.

(and through him the resources of the kingdom) by tying his hands in regard to the disposal of his goods, and that it would increase the resources of the enemy by enabling him to denude himself of present stocks in the assurance of obtaining supplies after the war and to realize in the present the value of this assurance by assigning the benefit of the contract to neutrals. It was, therefore, the possible benefit of the mere maintenance of the contract to the enemy while he was an enemy that constituted the vice of the suspensory clause in that case. It is true that Lord Dunedin points out the way in which that benefit might have accrued on the particular facts, but I am disposed to think from the whole tenor of his speech that the same principle must in his view apply to a suspensory clause as that which applies to a contract without such a clause, viz., that it is vitiated " not because of the terms of the " particular contract but because contract in general might " enhance the resources of the enemy or cripple those of the subjects of the King " (1). Lord Sumner dealt with the suspensory clause in rather a different way. He said (2) " My Lords, if upon public grounds on the outbreak of war the " law interferes with private executory contracts by dissolving " them, how can it be open to a subject for his private " advantage to withdraw his contract from the operation of " the law and to claim to do what the law rejects, merely to " suspend where the law dissolves ? A prohibition, which " arises at common law on the outbreak of war, has for this " purpose the effect of a statute." However the matter be put in the case of a contract with an enemy, I am of opinion that in the case of a contract with a neutral the performance of which during the war is illegal, a suspensory clause postponing performance until after the end of the war can only be bad if it is at least shown that the continued existence of the contractual relation between the British subject and the neutral will in fact tend to increase the resources of the enemy while he is an enemy or that there is at least a substantial probability that this will be the case. I can see no ground in principle or good sense why the continued existence of a contract with a neutral under a suspensory clause should be held to be contrary to public policy for any reason short of this. To hold otherwise would be to interfere with contractual relations with neutrals to an extent beyond what is necessary to safeguard the interest of the country in war.

(1) [1918] A. C. 273.
(2) Ibid. 286.

I have referred to this matter of suspensory clauses because it appears to me to be germane to the question which we have to consider. So far as this court is concerned, it is settled that the performance of the April contract during the war is illegal under the Trading with the Enemy Act, 1939. I am also prepared to agree with Simonds J. that such performance would be illegal at common law. The only effect so far is that performance is suspended during the war. Is there anything contrary to public policy in the continued existence of this contract on that basis? This question does not appear to me to be any different in principle from that which would arise if the suspension were consensual and not one imposed by law. To answer the question which I have formulated, it is convenient to examine the two parts of the April contract separately. If the contract had been one of guarantee only, the position would have been as follows. The Swedish bank has performed its part of the contract. It has, at the request of the guarantors, made the advance to the German company. Nothing remains for it to do, and it is entitled to expect from the guarantors the promised benefit in consideration of which the advance was made. The contract, therefore, is in this respect executed and not executory. Now, the obligation of the German company in respect of which the guarantee was given is to pay to the Swedish bank on the expiry of eight years from the date of the advance (that is, some time in April, 1944) the sum of 50,400*l.* in sterling (or the equivalent in blocked reichsmarks as the case may be), or, if the special provisions of cl. 4 of the February agreement come into operation, a larger sum calculated in accordance with the provisions of that clause. If the war with Germany is still continuing when the obligation of the German company matures in April, 1944, it will, in my opinion, be impossible for the Swedish bank to sue Schering, Ld., on their guarantee or to have recourse to the security so long as the war lasts. This follows from what I said in the earlier appeal (1). I was there dealing, it is true, with the payment of instalments, but a payment under the guarantee, would, in the same way as payment of an instalment, benefit the enemy by substituting for a Swedish creditor a British creditor who could not enforce his claim by subrogation against the German debtor until after the war, a manifest advantage to the German debtor.

Now let me assume that payment under the guarantee is only suspended. The position then will be that on maturity

(1) [1941] 1 K. B. 424, 438.

the Swedish bank will have no immediate recourse against anyone but the German company—I am assuming that a payment by the Indian company under its guarantee would be prohibited by the Indian law—and it may or may not call on the German company to pay. If it does call on it to pay and the German company discharges its debt, Schering, Ld.'s, obligation will be at an end, but it is impossible to foresee what the action of the Swedish company may be. Let me assume, therefore, that it prefers not to claim against the German company but to wait until the end of the war to enforce the guarantee against Schering, Ld. It would have been impossible at the outbreak of war in September, 1939 (which is the relevant date to consider) to predict that the Swedish bank would be likely to take this course in April, 1944. Any attempt or prophecy would have been pure speculation. Had the Swedish bank been asked the question in June, 1940, it is as likely as not that it would have considered action against the German company as its more probable choice since, if Germany had quickly won the war, a debt owing by a German company might well have been more valuable to it than a debt owing by a British company. Be this as it may, the questions to be considered are: (*a*) on the footing that the guarantee is suspended for the period of the war and that the Swedish bank will not on the due date claim against the German company but will wait until the end of the war and then enforce the guarantee against Schering, Ld., what will be the position at the end of the war?; and (*b*) will the fact that the position will be what, as so ascertained, it will be, benefit the enemy during the war?

I will deal with these questions in order. (*a*) If after the end of the war the Swedish bank enforces the guarantee against Schering, Ld., the latter will then be entitled by subrogation to sue the German company. The war being at an end, no difficulty will presumably exist in enforcing the rights of Schering, Ld., in the German courts, whether in their own name or in the name of the Swedish bank according as German law may prescribe. (*b*) During the war the German company will be confronted by the necessity of providing for payment of the debt when the war ends. All that will have happened will be that the amount of the debt will have to be paid at the end of the war to a different creditor, viz., Schering, Ld. This can hardly improve the credit of the German company during the war or otherwise confer an advantage on it. It is, however, said that *if* the obligation of Schering, Ld., under the guarantee is merely suspended during the war by operation of law, and *if* the due date arrives before the war is ended, and *if* it be assumed that when the due date arrives the Swedish bank will refrain from claiming against the German company and prefer to wait until the end of the war to enforce the guarantee, the German company will benefit by obtaining in effect a moratorium between the due date and the end of the war. That is true, and such a moratorium, *if* it were to take place, would presumably be of benefit to the German company during the war, but, putting ourselves at the outbreak of war—for it is by the outbreak of war itself, if at all, that the contract is said to have been abrogated—was it possible to say that the existence of the contract in a state of suspension would benefit the enemy during the war? That there was a possibility of benefit in the events supposed is, indeed, clear, but whether or not such benefit would ever materialize depended on the duration of the war and on the action which the Swedish bank might decide to take on the due date, assuming that the war was then still continuing. It may be right to assume—I express no opinion on it—that as on September 3, 1939, the duration of the war must have been regarded for the purpose of the present inquiry as being indefinite, and that the question must be examined on the basis that it will still be continuing when the due date arrives, but the other contingency remains, namely, the action of the Swedish bank in the events stated. As I have already said, what that action might be was at the outbreak of war and still is a pure matter of speculation and we have no means of forming any trustworthy opinion upon it.

Is it, therefore, to be said that a possibility of benefit to an enemy so vague and uncertain is to free a British subject from his obligation to a neutral, undertaken years before the war in respect of a guarantee of a sum of money advanced by the neutral to a German company at the request of the British subject? If I am right in drawing the distinction explained earlier in this judgment between the effect of war on contracts with an enemy and the effect of war on contracts with a neutral, the answer to this question must, as it appears to me, be in the negative. If such a mere possibility of benefit to an enemy is sufficient to abrogate a contract with a neutral, a large number of contracts with neutrals must necessarily fall. Many neutrals who have commercial relations with this country also have relations with Germany. The performance of, for example, a contract to buy goods from a neutral may place the neutral in funds which may enable him to discharge his obligations to a German whose customer he is or otherwise to facilitate his trading with Germany. On the other hand, it may not. It seems to me as impossible as it is on public grounds undesirable to lay down that mere possibilities of this character must as a matter of law abrogate a contract with a neutral. It is not for the law to act on suspicion or vague possibilities. It may well be, as is so often the case in war-time, that in the public interest action of some sort ought to be taken on them, but such action is appropriate to executive discretion and not to judicial decision which can only proceed on the basis of facts sufficiently established.

The guarantee, however, forms only part of the contract. It remains to consider the effect of suspension on the remainder of the contract which deals with the purchase of the debt by instalments. Here, as it seems to me, very similar considerations apply. There is a special point arising under the letter of March 17 to which I will refer later, but, apart from this, if the war does not come to an end until after April, 1944, when the last instalment is payable, all the remaining instalments will become immediately payable as soon as the war ends and the position will in effect be the same as that already discussed in relation to the guarantee. If, however, it was, at the outbreak of war, to be supposed that the war would come to an end earlier, only those instalments which had been postponed during the war would become payable at the end of the war. The remainder would fall to be paid on their due dates. On payment of these postponed instalments Schering, Ld., would acquire the corresponding instalments of the debt, but it would have no right to sue the German company before the due date for payment by that company arrived, viz., April, 1944. If after the war Schering, Ld., proceeded to pay the remaining instalments they would on the due date be entitled to sue the Germany company for the whole debt and the position for all practical purposes would be the same as it would have been if Schering, Ld., had paid under their guarantee and not by instalments. Here, however, the result of cl. 4 of the February agreement must be considered. Under that clause in its original form failure by the sureties to pay an instalment on the due date deprives the Germany company pro tanto of the benefit of the discount difference between 84,000*l.*, the sterling value of the sperrmarks acquired, and 50,400*l.*, the amount agreed to be paid for them. Postponement, therefore, puts the German company in a worse position than it would have been in if punctual payment had been made. It is, however, said that this result will not necessarily follow in view of the terms of the letter of March 17, 1936. What the effect of this letter may be as between the Swedish Bank and Schering, Ld., or as between Schering, Ld., and the German company, I do not pause to inquire. As I have already pointed out, Schering, Ld., were no parties to the arrangement contained in it, but, on the assumption that they are bound by it, it is said that mere unpunctuality in payment does not of itself deprive the Germany company of the benefit of the discount since the Swedish bank might obtain payment of an instalment at a date subsequent to the due date " by execution on the property of " the sureties or in some other way," in which case the benefit of the discount would be preserved. I very much doubt whether this is the true effect of the letter. Its more probable effect appears to me to be to extend the meaning of the words " acquire the claim " by adding other methods by which the Swedish bank may be satisfied without altering the requirement of punctuality, but, even if the interpretation contended for is correct, the case for abrogation of the contract is in no way strengthened. In giving my reasons for thinking that there is nothing in the contract to purchase the debt by instalments which calls for its abrogation I ignored the special results of cl. 4 of the February agreement in its original form. I have only referred to that clause as showing that under it postponement would operate to the detriment of the German company, and the only effect of the letter, construed as it is sought to construe it, is to make this reference inapposite.

The conclusion to which I have so far provisionally come is that the contract was not abrogated by the outbreak of war on the grounds of public policy, but I cannot finally adopt that conclusion without an examination of the judgment of Simonds J. and some further reference to authorities. Simonds J. took as the basis of his judgment two citations. One was from the speech of Lord Dunedin in the *Ertel Bieber* case (1) and is as follows: " From these cases I draw the " conclusion that upon the ground of public policy the " continued existence of contractual relation between subjects " and alien enemies or persons voluntarily residing in the " enemy country which (I.) gives opportunities for the

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(1) [1918] A. C. 260, 274.

" conveyance of information which may hurt the conduct of " the war, or (2.) may tend to increase the resources of the " enemy or cripple the resources of the King's subjects, is " obnoxious and prohibited by our law." I have already referred to the essential differences between the case of a contract with an enemy and that of a contract with a neutral. Simonds J. did not find it necessary to examine that matter for he said in reference to the April contract " that contract " is bound up with the earlier contract (sc. the February " contract) to which the German company was a party and " in fact it was the German company for whose benefit and at " whose instance the whole transaction was carried out." I am not sure whether I follow the exact implications of the phrase " bound up with the earlier contract." It is true that the April contract was made in consequence of the February contract, but in itself it was self-contained and it was made in consideration of the Swedish bank having, at the request of the guarantors, made the advance contemplated by the February contract. The fact that the February contract was originally made for the benefit of the German company does not, with all respect, appear to me to affect the matter. The German company obtained the full benefit to which it was entitled under the contract long before the outbreak of war. It only remained for it to discharge its obligations. Moreover, if by his statement Simonds J. meant that the German company alone benefited by the whole transaction I cannot agree with him. The transaction was presumably as much for the benefit of the Swedish bank, which possessed a commodity, namely, sperrmarks, that it was willing to sell, as it was for the benefit of the German company which was anxious to buy. The transaction was in effect an ordinary transaction of sale and purchase as between the Swedish bank and the German company, the peculiar features of it being due entirely to the fact that the Swedish bank required payment in sterling which, owing to German exchange laws, could only be effected by bringing Schering, Ld., into the transaction.

Simonds J. then proceeded to his second citation which was taken from the judgment of Russell J. (as he then was) in *In re Badische Co., Ltd.* (1). It is as follows: " But assume " a contract between British subjects, but of such a nature " that either its further performance involves intercourse with " the enemy or its continued existence would confer upon the

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(1) [1921] 2 Ch. 331, 373.

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" enemy an immediate or future benefit. Does such a contract " become void on the ground of illegality upon the outbreak " of war? The illegality being based upon considerations of " public policy, I can see no reason why a contract of such " a nature should not become void on the outbreak of war, " irrespective of any question whether the parties thereto are " enemies or friends. The test should be, in my opinion, not " whether one of the parties to the contract is an enemy, but " whether the contract involves intercourse with the enemy or " confers an immediate or future benefit on the enemy." Now, it will be observed that Russell J. gives two reasons why a contract between British subjects will be abrogated by the outbreak of war and his observations obviously cover also the case of a contract between a British subject and a neutral. The second of the two reasons is, as I understand it, because either the further performance or the continued existence of the contract will in fact confer an immediate or future benefit on the enemy, and when I say " in fact " I mean, of course, that it must be established to the satisfaction of the court that the result stated will take place. I do not understand Russell J. as meaning that a mere suspicion will be enough or that it is sufficient to show that in some supposed event the probability of which the court has no means of judging a benefit may accrue to an enemy. If I am rightly understanding the language of Russell J. it accords with the view which I have myself expressed earlier in this judgment. The *Badische* case (1), however, requires somewhat closer examination. The contract there in issue was between a British firm and a British company. It contained a suspensory clause. Russell J. held that the company on the facts possessed enemy character and that the contract was dissolved for that reason upon the outbreak of war, but he proceeded to express his views on the situation as it would have been if the company had not assumed enemy character at the outbreak of war and it is from this part of his judgment that the citation relied on by Simonds J. is taken. Russell J. dealt with this assumption on the footing that the goods referred to in the contract would come only from Germany. The contract, therefore, could not have been performed without trading with the enemy, and the suspensory clause also was necessarily bad since, to use Russell J.'s own words, " the continued " existence of the contract would have conferred upon the

(1) [1921] 2 Ch. 331.

" enemy an immediate or future benefit." The expectation of future orders necessary to fulfil the contract would clearly have benefited the enemy during the war since he would be helped by the assurance of a post-war market for his goods. If the contract had been with a neutral instead of with a British company the same result, I apprehend, would have followed since on the facts the continued existence of the contract under the suspensory clause would necessarily have conferred a benefit on the enemy. I cannot read Russell J.'s observations as having any wider application than this. The facts of the present case are very different.

The reasons given by Simonds J. for thinking that the second condition mentioned by Russell J. is fulfilled are as follows. He repeats that " the whole transaction from " beginning to end was for the benefit of the German " company," a matter with which I have already dealt. He then points out that the performance of the contract—by which I understand him to refer to its performance during the war—must benefit the enemy. In this I respectfully agree. Lastly, he deals with the position on the hypothesis that performance of the contract is suspended during the war. Here I venture to part company with him. He did not find it necessary to analyse the results of the contract. The analysis which I have made, if it is correct, appears to me to establish that the condition laid down by Russell J. is not satisfied on the facts. Simonds J. based his view as to the illegality of the continued existence of the contract under suspension not on the facts but on authority, for he said of the argument that the contract might validly remain in existence although its performance were suspended during the war: " it seems to " me that this is just the argument that was put forward and " long ago rejected in *Esposito* v. *Bowden* (1) and also *Naylor* " *Benzon & Co., Ld.* v. *Krainische Industrie Gesellschaft* (2) " and the *Ertel Bieber* case (3)." With all respect I cannot agree that any of these authorities decide that a contract between a British subject and a neutral the performance of which is prohibited during the war as being for the benefit of an enemy is necessarily incapable as a matter of law of remaining in existence under suspension, whether such suspension be due to operation of law or to a contractual term. Of the cases to which the learned judge refers, *Esposito*

(1) 7 E. & B. 763.
(2) [1918] 1 K. B. 331.
(3) [1918] A. C. 260.

v. *Bowden* (1) was the only one in which a contract with a neutral was in issue. In that case the contract was necessarily vitiated for the simple reason that its performance would have involved trading with the enemy by a British subject. The question of suspension only entered into the case by reason of a rather obscure argument that the contract could have been fulfilled after the war by purchasing a cargo during the war from subjects of Her Majesty or allied subjects at Odessa who had grain to dispose of at that port, but such a purchase, even if it had been possible, would itself have been illegal and the goods, if purchased, could not lawfully have been shipped. The *Naylor Benzon* case (2) was a simple case of a contract with an enemy. The contract contained a suspensory clause which McCardie J. held not to apply to the case of the war then in progress between this country and Austria, but he went on to discuss the position on the footing that the suspensory clause did apply and he held that the clause was void as being against public policy for reasons substantially the same as those approved by the House of Lords in the *Ertel Bieber* case (3). With all respect to Simonds J. I cannot extract from this judgment any proposition of law which concludes the present controversy. The *Ertel Bieber* case (3) had already been decided in this court, but had not yet reached the House of Lords. When the *Naylor Benzon* case (4) reached this court the court said no more than that after the judgment of the House of Lords in the *Ertel Bieber* case (3) (which had been delivered in the meantime) the case for the appellants was unarguable. I have already referred to the *Ertel Bieber* case (3) itself and pointed out what appear to me to be the essential distinctions between a contract with an enemy (with which alone the House was dealing) and a contract with a neutral.

Simonds J. also relied on the first of the two reasons for abrogating a contract given by Russell J. namely, that "its "further performance involves intercourse with the enemy." Simonds J. held that in the present case performance of the April contract would, having regard to ordinary commercial practice, be reasonably expected to involve communication with the enemy. This, he said, would take place since Schering, Ld., would not perform any of their obligations under the contract without inquiring of the principal debtor what

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(1) 7 E. & B. 763.
(2) [1918] 1 K.B. 331.
(3) [1918] A. C. 260.
(4) [1918] 2 K. B. 486.

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was the position in regard to the principal debt. With all respect, I do not think that there is substance in this point. I myself see no necessity to assume that any such communication would be necessary or likely, but, quite apart from this, as performance of the contract is in any event suspended during the war, communications of this character are ipso facto ruled out during the war. The fact that if performance had not been suspended communication would have been likely does not appear to me to throw any light on the question which has to be decided, viz.: does the law on the facts of the case demand not merely suspension but abrogation?

One other argument put forward on behalf of Schering, Ld., requires passing mention. It was said that the maintenance of the security which contractually was to be in goods would hamper the trading operations of Schering, Ld. and so be detrimental to this country; but the security is maintained for the benefit of a neutral, and, as I have already pointed out, it cannot be the case that a contract with a neutral is abrogated on the outbreak of war merely because its performance or existence is detrimental to this country. Moreover, even if a debt had been owing by Schering, Ld., to the German company and the security had been given in respect of that debt, I do not see on what principle the security could have been said to be set free on the outbreak of war. If this were the case, every mortgage in favour of an enemy would be abrogated on the outbreak of war so far as the security was concerned, a proposition which is quite contrary to the well established rule that an enemy is not at common law deprived of his proprietary rights in this country.

On the general question it is, I think, useful to consider what the position would have been if the Swedish bank had been a British company. The first question would have been whether or not the February contract would have been dissolved on the outbreak of war as between the supposed British company and the German company. In my opinion, quite clearly it would not have been dissolved. I ignore for this purpose the special provisions of cl. 6, 7 and 8 of the February contract. Apart from these provisions (whatever the effect of war on them might have been) the contract would, as between the British company and the German company, have been not an executory but an executed contract since the only obligation of the parties remaining unfulfilled would have been that of the German company to discharge the debt on the due date. How, then, could it have been said that a contract between the supposed British company and Schering, Ld., under which Schering, Ld., (1) guaranteed a perfectly good debt owing by the German company to the British company, and (2) undertook to purchase that debt by instalments would be abrogated by the outbreak of war as being against public policy? I cannot imagine anything more unjust. I need not consider the question whether or not payment of instalments during the war to the supposed British company would have been illegal. There would, at any rate, have been no question of a benefit to the German company by a substitution of a British for a neutral creditor, but whether it be or be not assumed that such performance would have been illegal, the argument, as it seems to me, is in nowise affected.

To conclude this part of the argument, I must refer to one matter which is not in evidence, but which was mentioned by counsel before us. I do so, not because it has in any way affected my conclusions, but because, to quote an author whose name is particularly appropriate to the situation, "things are "seldom what they seem." We were informed that all the shares in Schering, Ld., are held by the German company and have been made the subject of a vesting order, and that the liquidation has been brought about by the custodian appointed under the Trading with the Enemy Act. If, therefore, the contract was abrogated by the outbreak of war, the German company would benefit by having the sterling assets of its subsidiary freed from the obligations under the contract. It is true that the German company may never reap this benefit, but this, if it happens, will be due not to any rule of common law, but to some special arrangements to be made as to the disposal of enemy assets in this country. If the position had in this respect been governed by the common law as stated by Lord Parker in the *Daimler* case (1) the situation on the defendants' argument would have been truly described as Gilbertian.

The alternative argument to the effect that the April contract has been frustrated can be dealt with quite shortly. The frustration is said to have taken place at the outbreak of war by reason of the fact that all payments under it became illegal during the war. The argument assumes that the contract itself was not abrogated on the ground that the continuance of contractual relations became illegal. Frustration is said to have taken place because of the suspension of payments by operation of law. There are, of course, cases where suspension of a contract by reason of illegality may lead to abrogation of the contract by reason of frustration. The contract may be of such a nature as to call for the implication that if its performance is indefinitely delayed it is to come to an end, but I cannot see how the present can be such a case. All that is here in question is the payment of money and the assignment of that part of the debt which remains unassigned. That assignment may take place according to events either under the guarantee or under that part of the contract which relates to the purchase of the debt by instalments. The liability of the German company to the Swedish company cannot in any event be affected by a postponement of the obligations of Schering, Ld., to the Swedish bank for the period of the war. The most that can happen is a delay in the performance by Schering, Ld., of its pecuniary obligations and a consequential delay in the assignment of the debt in respect of which those obligations were incurred. It seems to me impossible to suggest that the parties, if their attention had been called to the point at the time when the contract was made, would have agreed that in the events which have happened the contract should be at an end. In my opinion the appeal should be allowed with costs here and below.

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(1) [1916] 2 A. C. 307, 347.

DU PARCQ L.J. I have had the advantage of reading the judgment which has just been delivered by my lord, and I agree that the appeal should be allowed for the reasons stated.

Appeal allowed.

Solicitors: *Slaughter and May; Kenneth Brown, Baker, Baker.*

J. W. H.

TURLEY v. MACKAY.

UTHWATT J.
1943
May 4.

Land Charge—Registration—"Estate contract"—Contract between principal and agent for land development in defined area—Undertaking by principal to develop and dispose of sites in such manner as agent should direct—Land Charges Act, 1925 (15 *Geo.* 5, *c.* 22), *s.* 10, *sub-s.* 1., *class C* (*iv*).

A contract, made in 1935, between the plaintiff (as principal) and the defendant (as agent), for furthering estate development,

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provided that the plaintiff should manage, develop, realize, or dispose of any site acquired by him under the supervision of the defendant in such manner as the defendant should think fit. The profits were to be divided between the parties in certain shares, but the contract, which was to apply to all land and estate development in which the plaintiff should be interested at any time within six years from its date in a defined area, was not to constitute a partnership between the parties. The plaintiff having, in 1942, entered into a contract to sell property acquired by him before the six years expired to a purchaser who had not been introduced by the defendant the defendant registered the contract of 1935 under the Land Charges Act, 1925, s. 10, sub-s. 1, class C (iv). The plaintiff applied for an order vacating the registration:

Held, that, as under the contract the plaintiff was bound to create a legal estate in land in favour of such third person as the defendant should direct, the contract was properly registered as " an estate contract " within the meaning of s. 10, sub-s. 1 (iv), of the Act.

SUMMONS.

By an agreement, dated September 6, 1935, and made between the defendant, Mrs. Maud Mackay, carrying on business as Jones & Croxford (hereinafter called " the agents ") and the plaintiff, Walter Edward Turley, after reciting that the plaintiff was desirous of entering into estate development and the nature of the operations necessary for that purpose, it was agreed that the agents and the plaintiff should operate on the following lines. The agents were from time to time as occasion arose to offer to the plaintiff such sites as they thought capable of being developed with advantage or to advise the plaintiff on sites to be obtained by him and to give him their advice as to the best means of developing them. By cl. 2: " Upon " the acquisition of a site by the [plaintiff] whether or not the " same shall have been introduced by the agents (the plaintiff " finding all sums required subject to deduction as hereinafter " mentioned) the [plaintiff] shall proceed to manage develop " realize or dispose of the site under the supervision and " direction of the agents in such manner as the agents in their " discretion shall think fit and whether by way of placing out " of contracts for building upon the site and obtaining advances " progressively or otherwise and subsequent sale of the buildings " erected or by way of piecemeal sale or granting of building " leases and the creation of ground rents or by combination " of those methods or any other method alternative thereto." By cl. 3 the plaintiff agreed with the agents that they should have the sale and exclusive agency for the sale and letting of

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all messuages houses and shops to be erected upon the sites acquired by the plaintiff. By cl. 4 the net balance of profit was to be divided between the plaintiff and the agents in equal shares, but any loss made on any site was to be borne by the plaintiff. By cl. 8 the agreement was to apply to all land and estate development and building operations in which the plaintiff should be interested at any time within six years from its date in the counties of Warwick, Worcester and Stafford, unless the agents gave notice in writing of their disinterestedness in any particular scheme. By cl. 9 the agreement was not to constitute a partnership between the parties. By cl. 10 the plaintiff, during the subsistence of the agreement, was not to engage in any land or estate development within the above area, with any person, firm or company other than the agents. After the period of six years named in the contract had expired, the plaintiff entered into a contract to sell an estate in the Birmingham district to a third party who had not been introduced by the defendant. On October 6, 1942, the defendant registered the contract as "an estate contract" under s. 10, sub-s. 1, class C (iv), of the Land Charges Act, 1925 (1). The plaintiff took out this summons asking that the court should make an order under s. 10, sub-s. 8, of the Land Charges Act, 1925, vacating the registration on the ground that the contract was not an "estate contract" within s. 10, sub-s. 1, class C (iv).

Lindner for the plaintiff. This is not a contract to convey or create a legal estate in any defined land, nor does it confer any option of purchase, right of pre-emption, or any other like right, in any land. Therefore, it does not come within the description of "estate contract" in s. 10, sub-s. 1, class C (iv), of the Land Charges Act, 1925, and it cannot be registered:

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(1) By Land Charges Act, 1925, s. 10, sub-s. 1: "The following "classes of charges on, or obligations "affecting, land may be registered "as land charges in the register of "land charges, namely.... Class C. "—A mortgage charge or obliga- "tion affecting land of any of the "following kinds, created either "before or after the commencement "of this Act .... namely .... "(iv) Any contract by an estate "owner or by a person entitled at "the date of the contract to have a "legal estate conveyed to him to "convey or create a legal estate, "including a contract conferring "either expressly or by statutory "implication a valid option of pur- "chase, a right of pre-emption or "any other like right (in this Act "referred to as 'an estate "'contract')."

see the notes to the sub-section in Wolstenholme and Cherry's Conveyancing Statutes, vol. ii (12th ed., p. 840), where examples of true "estate contracts" are given. It is simply a commercial contract of a special character for general land development which gives the defendant an exclusive agency in all land schemes in which the plaintiff is interested for a period of six years which expired before the date of registration.

Myles for the defendant. An "estate contract" within the sub-s. may be a contract to create a legal estate, not only in the applicant for registration, but in any other person in favour of whom the applicant may direct a conveyance to be made. Here the defendant can direct the plaintiff to convey a legal estate in the property to any person whom she may nominate. Either a sale or a lease to any person nominated by the defendant involves the creation of a legal estate in that person, and the plaintiff cannot perform his contract without creating a legal estate. The effect of s. 10, sub-s. 1, class C (iv), is much wider than has been contended for the plaintiff. The ordinary builder's contract usually provides that a legal estate in land shall be conveyed to a third party.

UTHWATT J. The question which I have to decide is whether or not a contract made on September 6, 1935, between the plaintiff and the defendant is an estate contract within the meaning of s. 10, sub-s. 1, class C (iv), of the Land Charges Act, 1925. The matter was before me some time ago (1), but it turned out that the particulars of the charge entered on the register then given to me were not accurate. No objection is now taken as to the form of the entry, nor to the continuance of this registration, assuming it to have been rightly made, on the ground that the agreement has, in certain respects, at any rate, come to an end.

On the construction of the agreement it appears to be clear that, while the agents cannot require the plaintiff to sell, or grant the lease of, any property to themselves, it is for them to determine whether and how any site is to be disposed of and the plaintiff is bound to comply with the directions which the agents give him in good faith. The question, therefore, arises whether a contract under which one person is bound to a second person to create a legal estate in such a third person as the second person may direct is an estate contract. In my

(1) See [1943] W. N. 80.

opinion, the object of s. 10 is to secure that obligations affecting land may be registered by persons who have a commercial interest in seeing that those obligations shall be carried out. In this case, undoubtedly, the agents have such a commercial interest, and, on the construction of the section, I cannot see that it is limited to cases where the obligation is to convey or create a legal estate in favour of the person with whom the obligation is entered into. The section is perfectly general in its terms. Having regard to its language and the limited ground on which it is sought to displace the entry from the register, the application must be refused.

Solicitors: *Saunders, Sobell & Greenbury, for Whitehouse & Son, Birmingham; Peacock & Goddard, for Rigbey, Brown & Mills, Birmingham.*

H. L. L.

In re I. G. FARBENINDUSTRIE A.G. AGREEMENT.

C. A.
1943
Oct. 14, 15.

Practice—Summons—Originating summons—Joinder of parties—Commercial, not legal, interest—R.S.C., Or. XVI, r. 11.

The court has no jurisdiction to add as a party to proceedings a person who has only a commercial interest in those proceedings, even though his interest may be affected by the result of the proceedings.

Decision of Morton J. reversed.

APPEAL from Morton J.

Boots Pure Drug Co. (hereinafter called "Boots") applied to be added as parties to an originating summons which had been taken out by Bayer Products, Ld. (hereinafter called "Bayers"), under s. 51 of the Trustee Act, 1925, and s. 72 of the Patents and Designs Acts, 1907 to 1932. The summons asked that a vesting order should be made in favour of Bayers in respect of certain patents standing in the name of I. G. Farbenindustrie A.G. (hereinafter called "I. G."), a German company, and for the rectification of the Register of Patents accordingly. The summons could not be served on I. G. Boots had been granted a licence in respect of some of these patents under s. 2, subs. 1, of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. The licence was to last during the lifetime of the patent, and under it Boots were obliged to render accounts that the

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Reported by F. R. R. Burford, Esq., Barrister-at-Law.

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appropriate royalties might be ascertained. The royalties were to be paid and the accounts rendered to the Custodian of Enemy Property. Boots claimed to be interested in opposing the making of the order asked for by Bayers, but Bayers resisted their claim to be joined as parties to the summons on the ground that Boots were not entitled to any legal interest in the subject-matter of the proceedings. Morton J. held that he had a discretion to direct that Boots should be made respondents to the summons, and he directed accordingly. Bayers appealed.

Harman K.C. and *Gordon Brown* for Bayers. Boots have no locus standi in the proceedings, and are strangers to them. They have at most a commercial, and not a legal, interest in their subject-matter. Morton J. had no jurisdiction to direct Boots to be made respondents so that an amicus curiæ might be before the court. *In re Trusts of Agreements by I. G. Farbenindustrie A.G.* (1) was similar to the present application, but the point now at issue was not decided there. There is nothing in the Rules of the Supreme Court or in the practice of the court to justify adding Boots as a party.

Valentine Holmes for Boots. Morton J. was right. Serious injustice might be done if parties in the position of Boots could not be joined in such proceedings. It is not correct to say that Boots have no legal interest. In certain circumstances they could institute proceedings in their own names ; Patents, &c. (Emergency) Act, 1939, s. 2, subs. 5. Apart from anything contained in the Rules of the Supreme Court, the court has jurisdiction to join as parties persons who have a proper interest in proceedings : *In re Fowler* (2) ; *The Leon Blum* (3).

LORD GREENE M.R. The order under appeal cannot be supported.

It is argued by Mr. Valentine Holmes that in view of the language of the Patents, &c. (Emergency) Act, 1939, Boots have a legal interest in the subject-matter of the summons to which they seek to be added as a party. He confessed himself, however, unable to find any words which could appropriately describe the nature of that legal interest and I share his difficulty. He pointed out that under the licence and

(1) (1940) 58 R. P. C. 31.
(2) (1916) 142, L. T. Journ. 94.
(3) [1915] P. 90.

the Patents, &c. (Emergency) Act, 1939, his clients are entitled to bring proceedings in their own name, but that is also possible under ss. 24 and 27 of the Patents Acts, for the grantee of a compulsory licence granted under those sections can in certain circumstances bring an action for infringement in his own name. It seems, however, clear that such a right in a licensee has nothing to do with the subject-matter of these proceedings which relate solely to the legal title to these patents. Ought that title to be vested in Bayers, or ought it to remain vested in I. G.? Whichever way that question is answered, the position of Boots cannot be affected from the legal point of view. When I say "legal interest" I am not thinking of any distinction between a legal and an equitable interest, but of an interest which the law recognizes.

It is to be observed that Morton J. certainly did not accept any argument addressed to him to the effect that Boots had a legal interest. He said that their interest was commercial. That they had a commercial interest is beyond dispute. Mr. Holmes pointed out, for instance, that they will now have to render accounts of their sales to a trade competitor, no doubt a consideration of great importance from the commercial point of view, but the chance that these patents would come into the hands of a trade competitor after the grant of the compulsory licence was a commercial risk which Boots took when they applied for and obtained the licence and prepared to trade on the strength of it. The patents, for instance, might have been sold by the Custodian of Enemy Property under a vesting order and have come into the hands of a trade competitor in that way. The fact that a person has a merely commercial interest in litigation gives him no right to demand to be added as a party to proceedings by the result of which that commercial interest may be affected, and the court has no jurisdiction to add him any more than it has jurisdiction to add any man in the street. It is the practice of the court, and the court has power in proper cases, to add at his own request a party who claims to have a legal interest in the subject-matter of the suit. That frequently happens in proceedings in the Chancery Division where creditors, debenture holders, beneficiaries and other persons who have a legal, and not merely a commercial, interest in the proceedings can, in proper circumstances, apply and obtain an order to be added as defendants in administration or other proceedings. I have never heard of a case where the court has claimed to exercise jurisdiction to add as a party a person who has nothing more than a commercial interest. The arguments which Mr. Holmes would desire to put forward, were he successful on this appeal, would relate solely to the question of title as between Bayers and I. G. In that question Boots have no concern in law. That being so, they have no locus standi to be added, nor has the court any power to add them.

The main argument on which they would wish to rely to defeat Bayers's application for the vesting order is that the contract on which Bayers's title to treat I. G. as bare trustees for them is rested was abrogated at common law on the outbreak of war, I. G. being an enemy company. That argument affects the right of Bayers to claim a vesting order against I. G. I will assume that, if that argument be right, the beneficial title to the patents would not be vested in Bayers and they would have no right to call for a vesting order. There would be a title remaining in I. G. other than a title as bare trustees, that is, a title which could be made the subject of a vesting order under the Trading with the Enemy Act, - 1939, and, accordingly, there is a proper method of securing that that argument could be put before the court. Morton J., while accepting the view that Boots's interest was merely a commercial interest, clearly thought it desirable that the court should have before it somebody to argue that point. With all respect to him, that did not give him jurisdiction to call in somebody to argue it for him as amicus curiæ and to add as a party to the summons somebody who had no legal interest in its result. It would be equally suitable to call in the first person whom one happened to meet in the street. Boots's interest from the point of view of this litigation is no higher than that. I appreciate that Morton J. did not wish to deal with the argument in the absence of somebody to present it, but he would not be without assistance if he took the appropriate steps. One step could be taken under the Patents Acts by directing the Comptroller, under the court's powers in that behalf, to attend and appear. The Comptroller is concerned with the right conduct of the register, and he is, therefore, interested in seeing that no one gets on the register unless he is entitled to do so. If the argument be correct, it would appear that Bayers would not be entitled to get on the register, and it would be for the Comptroller to oppose their application. In the alternative, the matter could have been brought to the attention of the Board of Trade and they could be invited either to appear as such or to make a vesting order under the Trading with the Enemy Act, 1939, so that the Custodian might appear and argue against the vesting order asked for by Bayers.

However that may be, those are matters for the judge to decide. Even if there had been no such machinery for obtaining assistance for the court in dealing with the point, that would not give the court jurisdiction to call on somebody who has no interest in the subject-matter of the summons, making him a party to it merely to help the court in the decision of a point on which the court would wish to hear argument. It often happens that a court is left to decide a matter without the assistance of argument on one side. The court in those circumstances has to rely on counsel on the other side who, according to the practice and traditions of the Bar, always gives the court such help as he properly can in view of the fact that he is an advocate for the other side. The difficulty of deciding matters of that kind is one with which the courts are confronted every day, and if the principle on which the learned judge acted were to be followed it would mean that many persons would be added to litigation in which they had no interest except a commercial interest, and that would establish a precedent which is not justified by any authority and, in my opinion, would be most unfortunate. In the present case, why should the matter stop at Boots? We are told that many licences have been granted in respect of these patents. Why should Boots have the privilege alone of putting these matters forward? Why should not some other licensees be heard to say that they had some other argument which they wished to place before the court? If Boots had been joined as parties to this summons there would be no answer to applications by other licensees.

In my opinion, the learned judge, in his anxiety to get all the help possible from a competent source upon a point which appeared to him to be likely to turn out difficult, has taken a step which is not warranted by any rule of practice. While holding that he had a discretion independently of any rule of court, he relies specifically on R. S. C. Or. XVI, r. 11. Mr. Holmes did not try to base any argument on that rule. In fact, he said it had no application to a case of this kind. I do not find anything in the rules which entitles the court to add for its own convenience a party having a merely

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commercial interest in the subject-matter of the suit, and no legal interest in it. The learned judge gave to that rule a scope which its language will not bear and would be quite inconsistent with the way in which the rule has always been regarded in the general practice of the courts. In those circumstances, the appeal must be allowed with costs.

DU PARCQ L.J. I agree.

UTHWATT J. I agree.

Appeal allowed.

Solicitors for Bayers : *McKenna and Co.*
Solicitors for Boots : *Seaton Taylor and Co.*

UTHWATT J.
1943
Nov. 5.

In re HALL.

PUBLIC TRUSTEE *v.* MONTGOMERY.

Will—Condition subsequent—Forfeiture—Annuity—Act whereby annuity would become vested in or payable to any other person—Annuitant resident in enemy territory—Payments to Custodian of Enemy Property.

A testatrix bequeathed an annuity to X and directed that, if she should alienate or charge it or do or suffer any act whereby it might become vested in or payable to any other person, it should be forfeited. In 1940, when X, who was a French national, was living in France, the provisions of the Trading with the Enemy Act, 1939, came into operation as regards France, and under them her annuity, if not forfeited, became payable to the Custodian of Enemy Property. X continued to live in France :—

Held, that X had not, by being in France in 1940 or continuing to live there, done or suffered anything which brought about a forfeiture of her annuity.

ADJOURNED SUMMONS.

A testatrix, who died on March 12, 1941, by her will, dated July 29, 1936, directed her trustees to stand possessed of a trust fund on trust out of the income thereof to pay an annuity of 300*l.* to her brother and another annuity of 120*l.* to La Comtesse de Prahas. By cl. 9 of her will the testatrix directed that, if her brother or the countess "shall alienate "or charge their respective annuities or become bankrupt "or do or suffer any act or thing whereby the said annuities "or any part thereof would or might but for this present "provision become vested in or payable to any other person "or persons such annuities shall cease to be payable and my "trustees may in their absolute discretion pay such annuity "or annuities or any annuity or annuities of a smaller amount "or amounts to any or either of them the said annuitants or "any other person being a then living person whose name is "referred to in this my will." During June and July, 1940, the countess, who was a French national, was resident in France, and she was still resident there when she was last heard of in April, 1942. Two of the executors of the will took out a summons to determine whether the annuity given to her ceased to be payable having regard to the fact that, in view of the provisions of the Trading with the Enemy Act, 1939, it would, if not forfeited, become payable to the Custodian of Enemy Property.

Sir Norman Touche for the executors.

W. F. Waite for residuary legatees. After the provisions of the Trading with the Enemy Act, 1939, came into operation as regards France, the annuity, if still payable, became payable to the Custodian of Enemy Property instead of to the countess. Her conduct in continuing to live in France, therefore, constituted the doing of an act which brought about the forfeiture of the annuity imposed by cl. 9 of the will.

Danckwerts for the Board of Trade. The countess has not done or suffered anything which causes her to forfeit the annuity. "Suffer" may mean that something happens to a person who has done nothing, but it may also mean "permit," and in construing this clause it is right to put the latter meaning on the word, the test intended being whether or not there has been an act of volition on the part of the countess. The circumstances in which the annuity has become payable to the Custodian instead of to the countess are not the result of any act of volition on her part, and consequently there is no forfeiture. The authorities on this class of forfeiture are reviewed by Morton J. in *In re Baring's Settlement Trusts* (1).

(1) [1940] Ch. 737.

UTHWATT J.

1943

HALL, In re. PUBLIC TRUSTEE v. MONTGOMERY.

UTHWATT J. Having regard to the fact that the countess was living in France, the effect of the provisions of the Trading with the Enemy Act, 1939, was that the annuity, if not forfeited, would become payable to the Custodian of Enemy Property. The question is whether, in those circumstances, it can be said that the countess has done or suffered anything whereby the annuity has become forfeited, with the result that it is not payable to the Custodian.

The condition is a condition subsequent, and the rule is that a condition subsequent must be construed strictly. Reading the clause as a whole, it seems to me that it is directed to the forfeiture of the annuity in the event of the annuitant personally doing certain classes of things, such as alienating or charging it, or permitting an act to be done whereby she is deprived of her annuity. It appears not to be directed to a case where the annuity is subject to an alienation which is not the result of the countess's own act. In my view, it cannot be said that she has done an act, as a result of which the annuity has become payable to the Custodian. She was in France, the normal place for a French national, when her property became subject to the provisions of the Act, and I fail to see how the fact that she was there and remained there can be said to amount to the doing of an act of the kind which is contemplated by the clause. The question whether she has "suffered" anything is, perhaps, more open. The word "suffer" is capable of more meanings than one. I have come to the conclusion that it is proper to attribute to the word in this clause the meaning "permit." It is clear that the annuitant has not permitted anything to be done. Nothing has happened, therefore, to bring this condition subsequent as to forfeiture into operation and the annuity is payable to the Custodian.

Solicitors: *Joynson-Hicks & Co.; Field, Roscoe & Co.; Solicitor to the Board of Trade.*

J. L. D.

In re BURROWS.

Ex parte OFFICIAL RECEIVER *v.* STEEL.

MORTON
AND
COHEN JJ.

1943

Nov. 1.

Bankruptcy—Act of bankruptcy—Debtor absenting himself—Period of absence beginning more than three months before presentation of petition—Relation back of trustee's title—Bankruptcy Act, 1914, (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 4, *sub-s.* 1 (c), *s.* 37, *sub-s.* 1.

On December 1, 1942, a receiving order was made on a creditor's petition, presented on October 20, 1942, against a debtor in respect of an act of bankruptcy, namely, that "on May 1, 1942, with "intent to delay and defeat his creditors he departed from his "dwelling-house and has continued and still continues to absent "himself with the like intent as aforesaid down to the date "hereof":—

Held, that the debtor's absence being a continuing act of bankruptcy, in view of the provisions of s. 4, sub-s. 1 (*c*) of the Bankruptcy Act, 1914, that a bankruptcy petition must be grounded on an act of bankruptcy which has occurred within three months before the presentation of the petition, the title of the trustee in bankruptcy did not relate back, under s. 37, sub-s. 1, of the Act, beyond July 20, 1942.

Appeal from Norwich county court.

On December 1, 1942, a receiving order was made against a debtor on a creditor's petition presented on October 20, 1942. The order was as follows: "And it appearing to the court "that the following act of bankruptcy has been committed, "viz.: on May 1, 1942, with intent to defeat or delay his "creditors he departed from his dwelling-house and has "continued and still continues to absent himself with the "like intent as aforesaid down to the date hereof, a receiving "order is hereby made against the debtor" (1). The question

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(1) By Bankruptcy Act, 1914, s. 1, sub-s. 1: "A debtor commits an "act of bankruptcy in each of the "following cases: . . . . (*d*) If "with intent to defeat or delay "his creditors he . . . . departs "from his dwelling-house, or "otherwise absents himself . . . ."

By s. 4, sub-s. 1: "A creditor "shall not be entitled to present "a bankruptcy petition against a "debtor unless . . . . (*c*) the act "of bankruptcy on which the "petition is grounded has occurred "within three months before the "presentation of the petition."

By s. 37, sub-s. 1: "The bank-"ruptcy of a debtor . . . . shall "be deemed to have relation back "to, and to commence at, the "time of the act of bankruptcy "being committed on which a "receiving order is made against "him, or, if the bankrupt is

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arose whether the title of the official receiver, as trustee in bankruptcy, related back to May 1, 1942, the date on which the debtor first absented himself, or only to July 20, 1942, namely, three months before the date of the presentation of the petition, various transactions giving rise to the petition having taken place between those two dates. On a motion to determine this question, the county court judge held that the trustee's title could not relate back further than three months from the date of the presentation of the petition. The trustee appealed.

Aronson for the trustee. This appeal should be allowed. The disappearance of the debtor on May 1, 1942, is the act of bankruptcy on which the petition is founded. It is true that, if it had been committed only on that date, no receiving order could have been made because of the provisions of s. 4, sub-s. 1 (*c*) of the Bankruptcy Act, 1914, but this act of bankruptcy is a continuing act and the title of the trustee can, therefore, relate back to May 1, 1942. Under s. 37, sub-s. 1 of the Act the title of the trustee relates back to the time of the act on which a receiving order is made, namely, in the present case, the departure on May 1, 1942. It is thus stated in the order, and, in view of the wording of s. 137, sub-s. 2, the order must be taken to have been duly made. [He referred to *In re Alderson* (1); *Ex parte Villars* (2); *Ex parte Learoyd* (3); *Ex parte Tucker* (4); and *In re a Debtor* (5).]

Raeburn for a party interested. The suggestion that the title of the trustee can relate back beyond the three months' limit imposed by s. 4, sub-s. 1 (*c*) of the Act is contrary to the policy of the legislature. If it were right, the doctrine of relation back would be completely at large and relation back might even extend to thirty years. It has been the policy of the legislature not to lengthen the period of relation back, but to reduce it: see *Coles* v. *Wright* (6). The act of bank-

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"proved to have committed more "acts of bankruptcy than one, to "have relation back to, and to "commence at, the time of the "first of the acts of bankruptcy "proved to have been committed "by the bankrupt within three "months next preceding the date "of the presentation of the bank-"ruptcy petition . . . ."

(1) [1895] 1 Q.B. 183.
(2) (1874) L. R. 9 Ch. 432, 445.
(3) (1878) 10 Ch. D. 3.
(4) (1879) 12 Ch. D. 308.
(5) (1912) 106 L. T. 344.
(6) (1811) 4 Taunt. 198.

ruptcy referred to in s. 37, sub-s. 1, means solely the act of bankruptcy committed during the period prescribed by s. 4, sub-s. 1 (*c*), or the first of such acts committed during that time.

Aronson replied.

MORTON J. This appeal raises an interesting question of law which may be stated as follows: Where the act of bankruptcy on which a receiving order is made is a continuing act, to what time does the title of the trustee in bankruptcy relate back under s. 37, sub-s. 1, of the Bankruptcy Act, 1914?

By s. 4, sub-s. 1 (*c*) of the Act, in order that a creditor may have any locus standi he must rely on an act of bankruptcy which has occurred within three months before the presentation of the petition. I observe, in passing, that it appears to me that the words "departs from his dwelling-house" in s. 1, sub-s. 1 (*d*), refer to an act which is not a continuing act, but is the definite act of departure, whereas the words "or "otherwise absents himself" refer to a continuing act. It was, in fact, decided in *In re Alderson* (1) that the absence was a continuing act, Vaughan-Williams J. expressing it as follows: "I think that for a debtor to absent himself with intent to "defeat or delay his creditors is a continuing act of bankruptcy."

In the present case it appears to me that, in view of the provisions of s. 4, sub-s. 1 (*c*) of the Act, the trustee cannot rely on any act of bankruptcy which occurred more than three months before the presentation of the petition. This being so, he cannot rely on any earlier act than the "absence" which occurred within three months before the date of the presentation of the petition. The trustee appears to be in this dilemma. If he says that the time of the commission of the act of bankruptcy on which the receiving order was made was not within three months of the presentation of the petition, the petition is out of order. He must, therefore, say that the time of the act of bankruptcy was within the three months and occurred while the debtor was still absenting himself with intent to defeat or delay his creditors. I may add that, as was pointed out by Cohen J. in the course of the argument, it is clear that where there is more than one act of bankruptcy the trustee's title cannot relate back to an earlier date than three months preceding the date of the presentation

(1) [1895] 1 Q. B. 183, 186.

of the petition, yet, if the argument for the trustee is right, in the case of a single continuing act of bankruptcy the title of the trustee can relate back to a period which might be ten, twenty, thirty, or even more years before the date of the presentation of the petition. It is possible to conceive a continuing absence which might extend for a very long period, and, if the argument for the trustee is right, his title might relate back, under the earlier portion of s. 37, sub-s. 1, to a very remote date, whereas under the later portion, where the sub-section refers to more acts of bankruptcy than one, it could not relate back to a date earlier than three months before the presentation of the petition. I would also add that the policy of the legislature, as Mr. Raeburn pointed out, seems to have been in the direction of reducing the period of relation back, as it was reduced, first, from twelve to six months, and then from six to three months.

One other point was taken by Mr. Aronson to which I must refer. He relied on the wording of the receiving order and on that of s. 137, sub-s. 2 of the Act. I agree that we must proceed on the footing that the receiving order was duly made and that its date was December 1, 1942, but that order can have been only duly made if there had been an act of bankruptcy occurring within three months of the presentation of the petition. In my view, the wording of the receiving order might, possibly, have been more happy if it had run as follows: "Having departed from his dwelling-house on May 1, 1942, "with intent to defeat or delay his creditors, he has continued "and still continues to absent himself with the like intent as "aforesaid down to the date hereof." It seems to me manifest that the effective portion of the order is the reference to the debtor's absenting himself and not the statement that on May 1, 1942, he departed from his dwelling-house. Indeed, if the order had stopped at the words "departed from his "dwelling-house," it would state, as the act of bankruptcy on which it was founded, an act which occurred more than three months before the date of the presentation of the petition. I think I must read the order as stating an act of bankruptcy which would be a good ground for the making of an order, that is to say, an act of bankruptcy which occurred within the relevant period.

Mr. Aronson referred to a number of cases, but I do not think I need travel through them. None of them, to my mind, justifies the claim of the trustee to go back to May 1, 1942.

The decision of the learned county court judge was right and this appeal must be dismissed.

COHEN J. I agree. I would only add that I think the result to which my brother referred is forced on us by s. 137, sub-s. 2, of the Act which directs that a copy of the order shall be conclusive evidence in all legal proceedings of the order having been duly made. It could not have been duly made unless it was made on the basis of an act of bankruptcy occurring within three months before the presentation of the petition. Morton J. pointed out that that result can only be reached by construing the wording of the receiving order in the sense in which he construed it. It is also to be observed that the wording of the order is taken from para. 4 of the petition which begins with the words "that" the debtor "within three months before the date of the presentation of "this petition has committed the following act of bankruptcy, "namely, on May 1, 1942 . . . ." It seems to me that the connexion between the receiving order and para. 4 of the petition makes it clear that the words "on May 1, 1942, "with intent to defeat or delay his creditors he departed from "his dwelling-house" are only descriptive, and that the real substance of the act of bankruptcy is to be found in the words "continued and still continues to absent himself with the "like intent as aforesaid down to the date hereof." I, therefore, agree that the appeal should be dismissed.

Solicitors: *Butt & Bowyer, for Daynes, Keefe & Durrant, Norwich; Vizard, Oldham, Crowder & Cash, for Mills & Reeve, Norwich.*

J. L. D.

In re W. & R. HOLMES AND COSMOPOLITAN PRESS, LIMITED'S CONTRACT.

SIMONDS J.

1943

Nov. 4.

Will—Trustee—Sale—Duration of power—Life interests to children—Reversionary interests to grandchildren or remoter issue.

A testator by his will made in 1872 gave his property to his trustees on beneficial trusts for his children for life and the lives of the survivors of them, with reversionary interests in favour of his grandchildren or remoter issue on attaining the age of twenty-one years, and he gave to his trustees power at any time to sell all or any of his property. In 1875 the testator died. In 1922 the trustees of the will, purporting to exercise the power of sale, conveyed to a purchaser property comprised in the will. In 1943 that purchaser, acting for himself and all other partners in a firm as vendors, agreed to sell that property and the applicants on this summons, as purchasers, agreed to buy it. The purchasers required the vendors to show that the power of sale was still exercisable at the date of the conveyance of 1922 by showing that the beneficial interests under the will were still then subsisting. The vendors were unable to satisfy that requisition :—

Held, (1.) that the power was to be construed as exercisable only during the period before the beneficial interests were ascertained and vested, or, at most, within a reasonable time thereafter.

In re Lord Sudeley and Baines & Co. [1894] 1 Ch. 334 ; *In re Cotton's Trustees and the School Board for London* (1882) 19 Ch. D. 624 followed.

(2.) That the purchasers' requisitions and objections had not been sufficiently answered and that a good title to the property had not been made in accordance with the contract.

VENDOR AND PURCHASER SUMMONS.

By his will, dated June 7, 1872, a testator gave all his property to his trustees on beneficial trusts in favour of his children for life and the lives of the survivors of them with reversionary interests in favour of his grandchildren who should attain the age of twenty-one years. The testator directed inter alia that it should be lawful for his trustees at any time absolutely to sell, convert into money, call in, or dispose of, or retain and continue all or any of the property thereinbefore devised and bequeathed. On June 27, 1875, the testator died. By a conveyance dated May 8, 1922, the trustees of the will, purporting to exercise the power of sale, conveyed to a purchaser property comprised in the will. By an agreement dated March 31, 1943, the purchaser under the conveyance of 1922, acting on behalf of himself and the other partners in a firm who were the respondents to this summons, agreed to sell, and the applicants on this summons agreed to buy, the property comprised in the conveyance of 1922. The purchasers made the following requisition on title : "The "will . . . . did not contain a trust for sale but only a power "which is not expressed to be limited as to the time when it "might be exercised. It could only be exercised while the "purposes of the settlement made by the will remain un-"exhausted . . . . The beneficial trusts must, therefore, be "abstracted and the deaths of parties stated so as to show that "the power was still exercisable in May, 1922, that is, forty-"seven years after the testator's death." The vendors could not satisfy this requisition, and contended that it was not incumbent on them to show that on May 8, 1922, conditions still subsisted under which the power could be exercised. By this summons, taken out on June 30, 1943, the purchasers asked inter alia for declarations that their requisitions and objections had not been sufficiently answered and that a good title to the property had not been made. It was stated in court that at least one child of the testator was still living in 1903.

Fawell for the purchasers. As the power of sale is not expressed to be limited in time, the inference must be that it can subsist only while the beneficial interests are on foot and for a short time afterwards: *In re Lord Sudeley and Baines & Co.* (1). Therefore, to see whether it was validly exercised on May 8, 1922, the court must investigate the position at that date, which it can do only by inquiring whether the beneficial interests were then in existence. Only in the light of that information can it be said whether the power was then exercisable, and, unless it was exercisable, the vendors have failed to make a good title. They have not been able to show that beneficial interests were subsisting at the date of the conveyance of 1922, and they have, therefore, failed to make a good title.

C. Gandy for the vendors. There is nothing to show that the power of sale was at an end on May 8, 1922. In any event, it must have been exercisable during the continuance of the life tenancies and until the vesting of absolute interests in the grandchildren of the testator who were of full age or in the personal representatives of any of them who predeceased the last surviving tenant for life. Therefore, if the power of sale was improperly exercised on May 8, 1922, that could have been so only because all the equitable interests were at that date absolutely vested in persons sui juris, and also possibly because more time had elapsed than that which is reasonably allowed for the exercise of powers of sale for purposes of division. If the equitable interests had by that date become vested in such persons, it must have followed that, for some time after the exercise of the power in 1922, there may have been equities in those persons entitling them to upset the sale, which equities

(1) [1894] 1 Ch. 334.

SIMONDS J.

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would in due course be barred by lapse of time. The legal estate, however, was, on May 8, 1922, undoubtedly in the trustees, and the only obligation of the present vendors is to show that if, at any time, that legal estate has been subject to equitable claims, it is now free from them. There is no doubt that such equitable claims are now unenforceable, for it is inconceivable that beneficiaries who were of full age and capacity on May 8, 1922, could now maintain, on the ground that the power was improperly exercised on that date, a claim against the present vendors, in whom the legal estate is admittedly vested. Where the validity of the exercise of a power has been questioned, the point has usually been taken against the trustees themselves who were claiming to exercise the power. In the present case, however, no question has been raised from the date of the exercise of the power until now, and the maxim "omnia præsumuntur rite esse acta" must apply. A power of sale comes to an end either because it is limited in time, or by the concurrence of the persons beneficially interested. Also, it can continue to be exercisable even after the vesting of the interests of those persons: *In re Cotton's Trustees and the School Board for London* (1). Here, the power is not limited in time, and it must be assumed to exist until it comes to an end by the concurrence of the persons beneficially interested. There is no evidence that that has happened. It is not incumbent on the vendors to show that beneficial interests still subsisted on May 8, 1922. They have made a good title to the property.

Fawell replied.

SIMONDS J. Clearly, a power of this kind contained in a will, if it is to be regarded as unlimited in point of time, must be bad as infringing the rule against perpetuities. Such a provision, however, is construed benevolently, so as to avoid that infringement, as limited in point of time by the intended purpose of the testator which can be ascertained from the document as a whole, and, in particular, the language of the provision in question.

In the present case, on the authority of *Lord Sudeley and Baines & Co.* (2) and *In re Cotton's Trustees and the School Board for London* (3), I must construe this power as being exercisable only during the period before the reversionary interests are ascertained and vested, or, at most (though I have some doubt as to this) within a reasonable time after they have been ascertained. Accordingly, the will must be read as if that limitation of time was therein set out. Thus, the power is exercisable within certain limits and while certain conditions subsist.

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(1) (1882) 19 Ch. D. 624, 626.

(2) [1894] 1 Ch. 334.

(3) (1882) 19 Ch. D. 624.

The question for my consideration then is whether, the power being exercised, it is incumbent on the vendors to show that the power was so exercised and that those conditions still subsisted. Clearly, if they did not subsist, the power was not validly exercised. The purchaser in effect says: "Here "is a power which was exercised in 1922. You must show me "that the conditions which were necessary to its valid exercise "then subsisted." That the vendors decline to do. It appears to me, in this case, that the purchasers are right in their objection. It is said (and the case was forcibly argued by Mr. Gandy) that, it being now 1943, the vendors are entitled to have it assumed in their favour that a power exercised in 1922, and not challenged from that day to this, was validly exercised. I see the force of that contention but, on the other hand, it appears to me that the purchasers ought not to have imposed on them the burden of speculating whether the conditions for the valid exercise of the power in 1922 in fact then subsisted or, if they did not subsist, what is the risk of the exercise of the power in 1922 being now challenged. In other words, the purchasers are not, in my judgment, to be put to the risk of a lawsuit. It is a salutary rule, of which many examples are to be found in this branch of the law, that the purchaser is not bound to be put to a risk of that kind, particularly as the vendor can, by appropriate provisions in the contract, safeguard himself against any undue trouble to which he might be put by inquiries about facts which took place some time ago. Accordingly, I think that the purchasers are entitled to be satisfied that when, in 1922, the trustees purported to exercise their power of sale, that power still subsisted by reason of the continued existence of the conditions which justified it.

A further argument has been advanced on behalf of the vendors that such a power of sale is indefinite in point of time and must be assumed to subsist unless it is determined by the concurrence of all the persons beneficially interested. I cannot subscribe to that view, for it appears to me that it is

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inconsistent with the view that such a power (unless it is to be regarded as limited in time) must infringe the rule against perpetuities. I must, therefore, declare that the requisitions and objections of the purchasers have not been sufficiently answered and that a good title to the property has not been made in accordance with the contract. The deposit must be repaid with interest at 4 per cent. per annum from March 31, 1943, until payment, and the purchasers must have their costs of the summons and of investigating the title.

Solicitors for purchasers: *Pollock & Co.*

Solicitors for vendors: *Torr & Co., for Brierley & Hudson, Rochdale.*

K. R. A. H.

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Oct. 15, 19; *Nov.* 25.

In re PRIEST, Deceased.

BELFIELD *v.* DUNCAN AND OTHERS.

Will—Attestation—Holograph will of personalty—Execution in Scotland—Domicile of testator in England—Attesting witness husband of beneficiary—Attestation of holograph will of personalty unnecessary under law of Scotland—Validity of gift—Wills Act, 1837 (1 *Vict., c.* 26), *ss.* 15, 35—*Wills Act,* 1861 (24 & 25 *Vict., c.* 114), *s.* 2.

A testator by his will gave half of his real and personal estate to his daughter-in-law. The will was a holograph will executed in Scotland on a form prepared for use in accordance with the law of Scotland, and one of the attesting witnesses was the daughter-in-law's husband. The testator died domiciled in England, and his estate consisted wholly of personalty. By the law of Scotland, a holograph will disposing of an estate which consists wholly of personalty does not require attestation:—

Held, that s. 35 of the Wills Act, 1837 (which provides that the Act shall not extend to Scotland), did not preclude the Act from applying to the will, to which, therefore, s. 15 of the Act applied, with the result that, the will having been attested by the daughter-in-law's husband, the bequest to the daughter-in-law failed; nor was the will to be held to be well executed under s. 2 of the Wills Act, 1861, as having been made within the United Kingdom by a British subject and executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where it was made.

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ADJOURNED SUMMONS.

By his will, dated July 30, 1941, and executed in Scotland, a testator provided: "I give and bequeath all my real and "personal estate as to one-half thereof to my daughter (naming "her) and one-half to my daughter-in-law (naming her)." The will was written on a printed form prepared for use in accordance with the law of Scotland, and save for the printed part and the attestation was wholly in the testator's handwriting. The testator's estate consisted solely of personal property. He had had two children, namely, the daughter named in the will and a son who had married the daughter-in-law named in the will and had predeceased the testator, leaving a daughter, who, at the date of this summons, was an infant. The daughter-in-law had re-married and her second husband was one of the attesting witnesses to the will. The executors of the will were advised that the bequest of half the residue to the daughter-in-law lapsed, and that there was an intestacy of that half. By this summons, the daughter's husband, who was one of the executors asked, inter alia, (1.) whether the daughter-in-law was entitled to the one-half share of the residue which had been bequeathed to her; (2.) whether there was an intestacy in respect of that half share; (3.) if there was, whether the daughter and granddaughter were entitled to have the half share divided between them in equal shares; and (4.) how the share of the granddaughter was to be dealt with. On July 15, 1943, the plaintiff died, and on July 23 it was ordered that the action be carried on between the daughter as plaintiff and the daughter-in-law and granddaughter as defendants.

According to the law of Scotland, a holograph will disposing of an estate consisting only of personal property does not require attestation.

R. Ritson for the plaintiff.

G. Russo for the daughter-in-law. The Wills Act, 1837, does not apply to Scotland: see s. 35. Therefore, s. 15 does not apply to this will, for it was made in Scotland, and the fact that the testator was domiciled in England is irrelevant (1). Therefore, the mode of attestation can be ignored, and the fact that the daughter-in-law's husband was one of the attesting witnesses does not disentitle her from taking the share that was bequeathed to her: see *In re Limond* (2). Moreover, the testator's estate consisted entirely of personalty, and, in accordance with the law of Scotland, could have been disposed of by an unattested holograph will. The testator's will was made within the United Kingdom by a British subject and was executed according to the forms required by the laws for the time being in force in that part of the United Kingdom, namely, Scotland, where it was made, and therefore it should be held to be well executed in England: see Wills Act, 1861 (Lord Kingsdown's Act), s. 2. On this ground, again, s. 15 of the Wills Act, 1837, can be ignored: *In re Limond* (2). The attestation was unnecessary, and the daughter-in-law is entitled to her one-half share.

Geoffrey Cross for the granddaughter. The only effect of s. 35 of the Wills Act, 1837, is that the Act is not to affect the testamentary law of Scotland. The words " shall not extend " to " merely mean " shall not affect the law of." The validity of a will of personalty depends on the domicile of the testator, which in the present case was English, and it is impossible to construe s. 35 as meaning that the Act is not to apply to the

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(1) By s. 15 of the Wills Act, 1837: " If any person shall attest " the execution of any will to " whom or to whose wife or " husband any beneficial . . . . " gift . . . . shall be thereby " given . . . . such . . . . gift . . . . " shall, so far only as concerns " such person attesting the execution of such will, or the wife " or husband of such person, or " any person claiming under such " person or wife or husband, be " utterly null and void . . . ."

By s. 35: " This Act shall not " extend to Scotland."

By s. 2 of the Wills Act, 1861 (Lord Kingsdown's Act): " Every will . . . . made within " the United Kingdom by any " British subject (whatever may " be the domicile of such person " at the time of making the same " or at the time of his or her " death) shall as regards personal " estate be held to be well executed, and shall be admitted in " England and Ireland to probate, " and in Scotland to confirmation, " if the same be executed according to the forms required by the " laws for the time being in force " in that part of the United " Kingdom where the same is " made."

(2) [1915] 2 Ch. 240.

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will made in Scotland of a testator domiciled in England. *In re Limond* (1) was the case of a soldier making a will under the privilege reserved to a soldier by s. 11 of the Wills Act, 1837, although in fact the will in that case was attested. The great difference between that case and this is that here it is perfectly plain that the testator was not intending to make a Scottish holograph will, but was intending to make, and did make, an English attested will, while, in *In re Limond* (1) the testator, although the will was attested, intended to make, and did make, a soldier's will under s. 11 of the Act. Here, the terms of the will point clearly to the intention that it should be an English will, and the testator was in fact domiciled in England. Therefore, the court is fully justified in holding that the testator was intending to make his will under the law of England, and should accordingly hold that the bequest to the daughter-in-law fails.

Russo replied.

Cur. adv. vult.

Nov. 25. BENNETT J. read a judgment in which he stated the facts, and continued: If s. 15 of the Wills Act, 1837, applies, it is clear that the gift to the daughter-in-law of one-half of the testator's esate is null and void. I take it to be settled law that the movable property of a testator disposed of by his will must be administered in accordance with the law of the country in which the testator was domiciled at the time of his death: see *Whicker* v. *Hume* (2), *Campbell* v. *Beaufoy* (3).

The first point taken by Mr. Russo, on behalf of the daughter-in-law, was that s. 15 of the Wills Act, 1837, does not apply to the testator's will, because it was made in Scotland, and 35 s. 35 of the Act enacts that the Act shall not extend to Scotland. The argument was, if I understood it correctly, that the effect of these words was to exclude the application of s. 15 of the Act to the will of a testator domiciled in England if he made his will in Scotland. Mr. Russo cited no authority to support his argument. In my judgment, s. 35 of the Wills Act, 1837, has not the effect for which Mr. Russo argued. The effect of the section merely is that the Act is not to alter or affect the testamentary law of Scotland: see *Reg.* v. *Lightfoot* (4).

(1) [1915] 2 Ch. 240.

(2) (1858) 7 H. L. C. 124.

(3) (1859) Johns. 320, 327.

(4) (1856) 6 E. & B. 822.

Mr. Russo's second point was that since, when he died, the testator had no real or immovable estate to dispose of and made his will in Scotland and was a British subject, and since he might have disposed of all his personal estate by an unattested holograph will made in Scotland, the court ought to hold as a matter of fact that the testator's will was made under s. 2 of Lord Kingsdown's Act as an unattested holograph will to which s. 15 of the Wills Act, 1837, did not apply. To support this argument Mr. Russo relied on the decision of Sargant J. in *In re Limond* (1). This case, Mr. Russo argued, was indistinguishable from the present case and bound me to decide in favour of his client. The headnote of the report of *In re Limond* is: "Sect. 15 of the Wills Act, 1837, does not apply "to a will made in exercise of the privilege reserved to soldiers "and seamen under s. 11 of the same Act. On the conclusion "of the Waziristan operations on the frontier of India in 1895 "a portion of the force remained in the Tochi Valley as an "escort to the party engaged in the delimitation of the frontier. "The testator was a lieutenant in an Indian regiment forming "part of this escort. While so serving the testator was mortally "wounded by a fanatic and was carried into camp, where he "dictated a will to his brother-in-law, whom he made his "residuary legatee, and died on the next day. The will was "signed by the testator and attested by his brother-in-law "and another officer as witnesses. His estate consisted of "personal property only:—*Held*, that the testator was in "'actual military service' within the meaning of s. 11 of the "Wills Act, 1837, at the time when he made his will. *Held*, "also, that notwithstanding the attestation by two witnesses "the will was a soldier's will made in exercise of the privilege "reserved by s. 11 and requiring no attestation; that s. 15 "of the Wills Act did not apply to a will so made; and that "the gift to the attesting witness was therefore valid." Sargant J. is reported to have used the following language (2): "Here the will in question was in fact executed in the presence "of two witnesses who were present at the same time and who "signed as witnesses in the presence of the testator, so that the "will was a will which would have been good independently "of the privilege given by s. 11 of the Wills Act; but, on the "other hand, it seems to me reasonably clear from the evidence "that that was really a matter of chance or coincidence, and

(1) [1915] 2 Ch. 240. (2) [1915] 2 Ch. 248.

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"that what the testator was intending to do was to make a "soldier's will. In Colonel Mein's account of the transaction, "as contained in the letter of June 18, 1914, he says this: "[His Lordship read the letter of that date above set out and "continued]. And in a letter of May 15, 1895, which was "written to his father-in-law, General Limond, by Captain "Cunliffe, the writer says this: 'Before the operation began, "'Alex. asked me to write a rough will and to call Major Mein "'to witness and hear it dictated.' I think, therefore, that, "although in fact the will does fulfil the requirements of the "Wills Act, still it was intended to be made as a soldier's will "and is entitled to the privilege reserved by s. 11."

It is, in my view, clear from the judgment of Sargant J. that his decision was based on the finding of fact that, although his signature was attested by two witnesses, the testator in that case was minded to make and did make a soldier's will in exercise of the privilege reserved by s. 11 of the Wills Act, 1837. It is impossible for me, on the evidence, to conclude that the testator in the present case intended to make an unattested holograph will disposing only of personal property which was to have legal operation and effect by force of the combination of the law of Scotland relating to holograph wills and s. 2 of Lord Kingsdown's Act. It would be wrong for me, having regard to the terms of this will, to conclude that the attestation of the testator's signature by two witnesses was a mere matter of chance or coincidence. For these reasons I decide that the daughter-in-law is not entitled to be paid the half share of the residue of the estate of the testator bequeathed to her by the will, and that there is an intestacy in respect of that half share.

His Lordship's attention was then called by *Ritson* to s. 49 of the Administration of Estates Act, 1925, which provides: "Where any person dies leaving a will effectively disposing of "part of his property, this part of this Act shall have effect as "respects the part of his property not so disposed of subject to "the provisions contained in the will and subject to the follow- "ing modifications:—(*a*) the requirements as to bringing "property into account shall apply to any beneficial interests "acquired by any issue of the deceased under the will of the "deceased, but not to beneficial interests so acquired by any "other persons . . . ." It was submitted that the effect of that provision was that the daughter still took only the half share which had been bequeathed to her, and that the

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granddaughter took the half share which had been bequeathed to the daughter-in-law. His Lordship declared that the daughter and granddaughter were entitled to the whole of the residue to be divided between them in equal shares.

Solicitors: *Ravenscroft, Woodward & Co.; Routh, Stacey, Hancock & Willis.*

K. R. A. H.

MORTON J.

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Nov. 24.

LEWIS FALK, LIMITED *v.* JACOBWITZ.

Design—Action to restrain threats—Defence of infringement—Onus of proof—Patents & Designs Acts, 1907 *to* 1942, *s.* 36, *sub-ss.* 1, 2.

In an action under s. 36, sub-s. 1, of the Patents and Designs Acts, 1907 to 1942, to restrain the defendant from threatening the plaintiff with an action for infringement of a registered design, in which the defendant alleges that the acts in respect of which the proceedings are threatened constitute, or, if done, would constitute, an infringement of the design and counterclaims, under s. 36, sub-s. 2, for an injunction to restrain the infringement, the plaintiff must first prove the threat or threats. Once that has been done, the onus shifts to the defendant and the burden is on him to prove that the acts in respect of which the proceedings are threatened constitute, or, if done, would constitute, an infringement of the design. If the defendant succeeds in proving that, the burden shifts again to the plaintiff to prove that the design is invalid. Therefore, where a threat is admitted it is for the defendant to open his case first.

ACTION.

The plaintiffs alleged that the defendant had threatened to sue them for infringement of a registered design No. 359,469 for embroidered material, and they claimed an injunction to restrain him from doing so. By his defence the defendant admitted that he had made a threat, and he alleged that the plaintiffs had imitated his registered design and counterclaimed for an injunction to restrain them. The plaintiffs, in their reply, said that the registration was at all times invalid, and counterclaimed for rectification of the register by cancellation of the registered design.

Paull K.C. and *Marlow* for the plaintiffs.
Burrell K.C. and *James Mould* for the defendants.

MORTON J. This is an action to restrain threats in which infringement of a registered design is alleged. A question (on which I believe there is no reported decision) is raised at the outset as to the onus of proof and which party should begin, the threats being admitted. In my view, on the true construction of s. 36 (1) of the Patents and Designs Act, 1907–1942, it is for the plaintiff in a " threats " action first to prove the threat or threats, and, once that has been done, the onus shifts to the defendant and the burden is on him to prove that the acts in

(1) By the Patents & Designs Acts, 1907 to 1942 :—

Section 36, sub-s. 1 : " Where " any person, by circulars, advertisements or otherwise, " threatens any person with an " action for infringement of patent " or other like proceedings . . . . " any person aggrieved thereby " may bring an action against him " and may obtain a declaration to " the effect that such threats are " unjustifiable and an injunction " against the continuance of such " threats and may recover such " damage, if any, as he has " sustained thereby, unless the " person making the threats " proves that the acts in respect " of which the proceedings are " threatened constitute or, if " done, would constitute an infringement of a patent in respect " of a claim in the specification " which is not shown by the " plaintiff to be invalid, or an " infringement of rights arising " from the acceptance of a complete specification in respect of " a claim therein which is not " shown by the plaintiff to be " capable of being successfully " opposed."

By sub-s. 2 : " The defendant " in any such action as aforesaid " may apply, by way of counterclaim in the action, for any " relief to which he would be " entitled in a separate action in " respect of any infringement by " the plaintiff of the patent to " which the threats relate."

By s. 61. " The provision of " this Act with respect to certificates of the validity of a " patent, and to the remedy in " case of groundless threats of " legal proceedings by a patentee, " shall apply with the necessary " modifications in the case of " registered designs in like manner " as they apply in the case of " patents."

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respect of which the proceedings are threatened constitute, or, if done, would constitute, an infringement of a patent or of a registered design. If the defendant succeeds in proving that, the burden then shifts again to the plaintiff to prove, if he can, that the patent or the registered design is invalid. In the present case one threat is admitted, and it is, therefore, for the defendant to open his case first.

Solicitors: *Biddle, Thorn, Welsford & Barnes; Maltz, Mitchell & Co.*

H. L. L.

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Nov. 26, 30;
Dec. 1.

In re OSMUND.

MIDLAND BANK EXECUTOR & TRUSTEE COMPANY, LIMITED, *v.* MASON.

Charity—Charitable bequest—Validity—Application of fund "to medical "profession for the furtherance of psychological healing."

By her will, dated August 1, 1942, a testatrix appointed the plaintiffs executors thereof and devised and bequeathed all her estate to them "upon trust in their absolute discretion to apply "the same to the medical profession for the furtherance of "psychological healing in accordance with the teaching of Jesus "Christ." The testatrix died in September, 1942. The plaintiffs took out a summons to decide whether the will created a valid charitable bequest, or whether it failed for uncertainty or any other reason:—

Held, that in view of the absolute discretion given to the plaintiffs as to the application of the estate, they were not limited to the use thereof for charitable purposes; that, that being so, the testatrix had not made a complete disposition of the beneficial interest in her estate; and that, therefore, the gift failed for uncertainty and the property devolved as on an intestacy to the next of kin.

Statement of the law by Lord Haldane in *Houston* v. *Burns* [1918] A. C. 337, 342, applied.

ADJOURNED SUMMONS.

The facts are set out in the headnote.

Guest Matthews (for *George Maddocks*) for the plaintiffs.

Danckwerts for the Attorney-General. This is a gift for the benefit of the whole community, and is a good charitable gift for the healing of the sick, to be carried out through the medical profession. The method of healing specified is recognized by the profession as psychotherapy. Healing the sick is a charitable object, and hospitals exist for the benefit of all classes. This healing comes within the wording of the preamble to the statute 43 Eliz., c. 4, the relief of " aged, impotent and poor " people : *In re Roadley* (1). It is also a trust, the object of which comes under the head of education, for the teaching of psychotherapy would fall within it.

Winterbotham for the next of kin. This is not a valid charitable gift. It is difficult to understand what was the real intention of the testatrix, but the leading idea appears to be to advance psychological healing. That does not include instruction or psychological research. No trust for " healing " simpliciter has been held to be charitable, and, if the gift is not charitable, it fails altogether. There is no perpetuity created, but the testatrix has not effectually disposed of the beneficial interest in her property, and, therefore, her next of kin are entitled : *Houston* v. *Burns* per Lord Haldane (2). The gift is void (1.) because it is not charitable and (2.) because it is not a gift to any individual or institution or class of individuals or institutions. It is a gift for purposes to which effect cannot be given by law. A gift to all the inhabitants of the village of X is void for uncertainty : *Blair* v. *Duncan* (3). To deprive the next-of-kin of the residue of an estate there must, generally speaking, be some trust enforceable by some person, corporation, or association. There are certain exceptions to this rule, but, even if an unenforceable trust is sufficient, it must be of a precise kind, leaving nothing to the trustees' discretion. Thirdly, any trust which is to deprive the next of kin of the residue must be certain, whether it is a charitable or non-charitable trust : *Morice* v. *Bishop of Durham* (4). It is obvious that this is not a gift to the medical profession for its own benefit. The trust has no definite object. There is no one who can insist on it being carried into effect, and a trust which cannot be enforced is invalid : *Bowman* v. *Secular Society* (5), per Lord Parker of Waddington ; *Houston* v.

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(1) [1930] 1 Ch. 524.
(2) [1918] A. C. 337, 342.
(3) [1902] A. C. 37.
(4) (1805) 10 Ves. 522.
(5) [1917] A. C. 406, 436.

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OSMUND, *In re.*

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Burns (1). There are a few exceptional cases, which are not applicable here, for instance, *In re Dean*(2) and *Attorney-General* v. *National Provincial and Union Bank of England* (3). *In re Hooper* (4) is a very doubtful decision.

Matthews, for the plaintiffs, referred to *In re Hummeltenberg* (5).

Danckwerts replied.

BENNETT J [having stated the facts]: The question which I have to determine is whether the disposition which the testatrix made is one for charitable purposes. I can decide the case, I think, on the principles laid down by Lord Haldane in his speech in *Houston* v. *Burns* (1), when he said: "By the "law of Scotland, as by that of England, a testator can defeat "the claim of those entitled by law in the absence of a valid "will to succeed to the beneficial interest in his estate only if "he has made a complete disposition of that beneficial interest. "He cannot leave it to another person to make such a dis-"position for him unless he has passed the beneficial interest "to that person to dispose of as his own. He may, indeed, "provide that a special class of persons, or of institutions "invested by law with the capacity of persons to hold property, "are to take in such shares as a third person may determine, "but that is only because he has disposed of the beneficial "interest in favour of that class as his beneficiaries. There is, "however, an apparent exception to the principle. The "testator may indicate his intention that his estate is to go "for charitable purposes. If these purposes are of the kinds "which the law recognizes in somewhat different ways in the "two countries as charitable, the courts will disregard a "merely subordinate deficiency in particular expression of "intention to dispose of the entire beneficial interest to a "class and will even themselves, by making a scheme of some "kind, give effect to the general intention that the estate "should be disposed of for charitable purposes." "Charitable "purposes" are divided into the following four classes by Lord Macnaghten in his well-known speech in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (6): "trusts for the "relief of poverty, trusts for the advancement of education,

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(1) [1918] A. C. 337, 342.
(2) (1889) 41 Ch. D. 552.
(3) [1924] A. C. 262.
(4) [1932] 1 Ch. 38.
(5) [1923] 1 Ch. 237.
(6) [1891] A. C. 531, 583.

"trusts for the advancement of religion, and trusts for other "purposes beneficial to the community not falling under any "of the preceding heads."

I have to ascertain, from the language which the testatrix has used, whether the plaintiffs are bound to apply her estate for one or other of those charitable purposes. It is suggested that they are bound to do so either for the advancement of education or for some other purpose beneficial to the community, and that they have no discretion which enables them to apply the estate for any other purpose. Psychological healing has been the subject of an affidavit made by a distinguished doctor, Dr. Hinds-Howell, consulting physician to St. Bartholomew's Hospital, in which he says that "psycho-"logical healing" is well-known in the medical profession and is embraced in the recognized practice of psychotherapy. It is not possible, he says, to give a concise outline of the practice of psychotherapy, but in essentials it entails discovering the mental factors which are causing symptoms of physical or mental distress or nervous and emotional disorders and helping the individuals to readjust themselves to those factors through their mental processes and so to restore them to health without resort to the aid of surgical treatment. There are many doctors in this country and also hospitals and clinics which specialize in the application of modern medico-psychological treatment or psychotherapy. With regard to the words "in accordance "with the teaching of Jesus Christ," the deponent says: "I do not think there is any direct teaching or instruction "by Jesus Christ in the Bible in this particular method of "treatment, but in my opinion, Christ's instructions to His "disciples to heal the sick would definitely cover the psycho-"logical form of healing by the medical profession to which "I have hereinbefore referred."

Is the absolute discretion which the testatrix has given to her executors as to the way in which "psychological healing "in accordance with the teaching of Jesus Christ" is to be furthered limited, as Mr. Danckwerts suggests, to furtherance by charitable means? I find no language in the will which enables me to place that limitation on the absolute discretion which the testatrix by her words has given to her executors. To take an extreme case, it seems to me that, if they came to the conclusion that there was some wealthy man suffering from chronic dyspepsia and that it would further psychological healing if they were to pay somebody to try to cure him, by

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psychotherapy, they might apply the testatrix's money in that way. In my judgment, that would not be an application of the testatrix's estate for a charitable purpose, but it would be within the absolute discretion which the testatrix has by her will given to her executors. For these reasons it seems to me that the disposition which the testatrix has made is not a disposition of her estate for charitable purposes and, that being so, having regard to the opening language of Lord Haldane's speech which I have read, she has not made a complete disposition of the beneficial interest in her estate. Therefore, her next of kin are entitled to the estate. I declare the gift to be invalid. The costs of the summons, as between solicitor and client, are to be paid out of the estate.

Solicitors: *Ridsdale & Son, for W. H. Heelis & Son, Hawkshead, Ambleside; Treasury Solicitor: Herbert Smith & Co.*

H. L. L.

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Nov. 16, 17, 18; *Dec.* 13.

In re POTTER'S WILL TRUSTS.

In re THOMSON'S SETTLEMENT TRUSTS.

ECKFORD *v.* THOMSON.

Will—Construction—Executory trust—Direction to trustees to settle daughter's share on her marriage—"For benefit of my daughter and "that of any children she may have"—Subsequent provision in the event of daughter "leaving any child children or issue of any child "or children"—Husband's and wife's funds settled on children of marriage—Death of husband and second marriage of wife—Right of children of second marriage to share with those of first marriage.

A testator gave a share of his residuary estate to his infant daughter to be paid to her on her attaining the age of twenty-five years or on her marriage under that age with the consent of her guardians and provided that in the latter event the share was "to be properly secured by settlement for my said daughter's "benefit and that of any children she may have." The testator next provided that, in the case of his daughter marrying under twenty-five years of age without the consent of the guardians, her share was to be held by the trustees upon trust for her for life. He then dealt with the capital of the share in the case of the daughter dying under twenty-five years of age without having married with the consent of the guardians and gave it to his widow, and he continued: "In the event of my said daughter leaving "any child children or issue of any child or children whether "married with her guardians' consent or otherwise then the said share "to vest absolutely in such child children or issue . . . . equally "as per stirpes and not per capita." In 1869 the testator's daughter, then aged sixteen, was married to T. with her guardians' consent, and immediately before the marriage a settlement, to which the guardians were parties, was executed settling the daughter's share on her for life and then on the children of the marriage as she should appoint and in default to the children in equal shares. T. died in 1875, leaving his widow and two children surviving him. No appointment in exercise of the power contained in the settlement was made, and in 1884 the testator's daughter married B. She died in 1940. There were two children of the second marriage, and they claimed that the settlement ought to have provided for them equally with the children of the first marriage:—

Held, (1.) that the clause of the will dealing with the event of the daughter "leaving any child children or issue of any child or "children whether married with her guardians' consent or "otherwise" was reconcilable with the direction for a settlement in favour of the daughter and any children she might have; (2.) that the settlement ought to have been made in conformity with the clause; and (3.) that in the clause the word "any" must be given its full meaning, with the result that the daughter's share was distributable among the children of both marriages who survived their mother.

Decision of Bennett J. [1943] Ch. 255 reversed.

APPEAL from Bennett J. (1).

By his will, dated June 12, 1854, and made and proved at Calcutta, the testator, Henry Maurice Potter, having appointed his wife, Amelia Anne Potter, and James William Henry Ilbury executors and trustees and joint guardians of his infant daughter, Florence Julia Alice Potter, gave his residuary estate to them on the usual trusts to convert and to divide the residue into two equal parts, one of which he gave to his wife absolutely. He then directed his trustees to hold the other part "in trust for my infant daughter Florence Julia Alice Potter "to be paid to her on her attaining the age of twenty-five years "or day of marriage whichever may first happen, such marriage "to be with the consent of her guardian or guardians as herein- "after mentioned, and in the meantime and till such payment" for the trustees to invest the daughter's share and apply the income for her maintenance as therein mentioned, "and to

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(1) [1943] Ch. 255.

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"pay over the said principal moneys and all interest and "dividends therein unto my said daughter when she shall "attain the age of twenty-five years or day of marriage, "whichever shall first happen. Provided such marriage is "with the consent of the guardian or guardians for the time "being of this my will, who I direct shall cause such share to "be properly secured by settlement for my said daughter's "benefit and that of any children she may have." The testator then provided that in the case of his daughter marrying under twenty-five years of age without the consent of the guardians her share was not to vest in her absolutely, but in lieu thereof was to be held by the trustees in trust for her for life. The testator then dealt with the capital in the case of the daughter dying under twenty-five without having married with the consent of the guardians, giving it to his widow, and he continued: "In the event of my said daughter leaving any child "children or issue of any child or children whether married "with her guardians' consent or otherwise then the said share "to vest absolutely in such child children or issue in such "manner as she my said daughter shall by will appoint or in "default of appointment then to such child children or issue "equally as per stirpes and not per capita." The testator died on June 21, 1854. In August, 1869, his daughter, then aged sixteen, contracted a marriage with James Cameron Thomson with the consent of her guardians, and on the occasion of that marriage a settlement, dated August 3, 1869, was made, comprising the share of the daughter in the testator's residuary estate and a policy of assurance to be effected by the husband. The parties to the settlement were the intending husband, of the first part; the testator's daughter, of the second part; the testator's widow, her second husband (Andrew Eaglesham), and J. W. H. Ilbury, of the third part; and A. Eaglesham and Alexander Gentle, the trustees of the settlement, of the fourth part. The settlement, after reciting the intended marriage and the will of the testator, including the direction to make a settlement of the testator's daughter's share in her father's estate, provided "that in consideration of the said intended "marriage and in pursuance of the power in that behalf con- "tained in the will hereinbefore recited the said Amelia Anne "Eaglesham with the consent of her husband Andrew Eagles- "ham . . . . and James William Henry Ilbury do and each "of them doth hereby assign unto the said Andrew Eaglesham "and Alexander Gentle the sum of 49,200 rupees (the daughter's

" share in the testator's estate) and the funds or securities in " which the same are now invested." After the marriage, the trusts declared were to pay the income of the trust moneys and securities during the joint lives of the husband and wife to the wife for her separate use, and after the death of the wife the trustees were to hold the premises and the income thereof " in " trust for the child or for all or any such one or more of the " children of the said intended marriage in such manner and " form in every respect as the said Florence Julie Anne Potter " shall by deed or by will or codicil appoint and in default of " any such appointment and so far as no such appointment " shall extend in trust for all the children or any the child " of the said intended marriage who being sons or a son shall " attain the age of twenty-one years or being daughters or " a daughter shall attain that age or marry and if more than " one in equal shares." The settlement also contained the following clause: " If there shall be no child of the said " intended marriage who being a son shall attain the age of " twenty-one years or being a daughter shall attain that age " or marry then (without prejudice to the trusts hereinbefore " declared) the said trustees or trustee shall hold the said trust " premises and the annual income thereof or so much thereof " respectively as shall not have become vested or been applied " under any trusts or powers herein contained upon the trusts " following (that is to say) if the said Florence Julia Anne " Potter shall survive the said James Cameron Thomson then " after his death on such default or failure of children as afore- " said in trust for the said Florence Julia Alice Potter and her " child or children by any future marriage the same to be " resettled on such marriage on trusts similar to those herein " contained." The settlement further provided that the policy of insurance which the husband was to take out should be held on the same trusts as the wife's fund. There was issue of the marriage three children, one of whom died an infant. The other two were the present trustees of the marriage settlement and the defendants to these proceedings. The husband, J. C. Thomson, died in 1875. In 1884 the testator's daughter married one Bowman, and of that marriage there was issue two daughters, the plaintiffs. On June 8, 1940, the testator's daughter died without having exercised the power of appointment given her by the settlement. The plaintiffs brought these proceedings against the defendants, claiming that the settlement of 1869 did not conform to the directions contained in the testator's will, and that it ought to be rectified so as to provide that the settled share of the testator's daughter should be held by the defendants in trust for the plaintiffs and defendants in equal shares. Bennett J. held that the guardians of the testator's daughter had a discretion in framing the settlement, and, having regard to the fact that the intended husband was bringing property into settlement, they were entitled to make a settlement which excluded the children of any second marriage, if, in their view, a settlement in that form was for the benefit of the daughter and some of her children. The plaintiffs appealed.

Christie K.C. and *Raymond Jennings* for the plaintiffs. This is an executory trust, not a discretionary one, and the trustees must carry out the terms of the will. The first essential is to construe the will, which makes provision for the following contingencies: (*a*) the daughter attains twenty-five unmarried, when she takes absolutely; (*b*) she dies under twenty-five, unmarried, when there is a gift over to her mother; (*c*) she marries under twenty-five without her guardians' consent, when her interest is cut down to a life interest and the trusts of the capital are set out; (*d*) she marries under twenty-five with her guardians' consent, when they are to settle the fund for her benefit and the benefit of any children whom she may have. The only way in which the later clause of the will can be rendered operative is by treating it as a direction as to the way in which the children are to be benefited by any settlement. [They referred to *Cogan* v. *Duffield* (1); *Young* v. *Macintosh* (2); *Stanley* v. *Jackman* (3); *In re Gowan* (4); *In re Parrott* (5); *Nash* v. *Allen* (6); *In re Galsworthy* (7); *Loch* v. *Bagley* (8).] All these cases show, first, that one must look at the construction of the will, and, secondly, that a trust for a woman and her children will include children of all marriages. Here the will contains a general direction which would prima facie produce that result, and later an express direction achieving that result.

Vaisey K.C. and *Wilfrid Hunt* for the defendants. The words "properly secured by settlement" do not indicate a hard and fast document. The nature of a proper settlement falls to be decided according to the circumstances at the time, and we do not know what they were seventy-four years ago when this settlement was made. Can we now say that no circumstances would justify the trustees in making that settlement? The testator's daughter could assuredly have exercised the power of appointment in favour of the children of the first marriage. Why cannot the same effect be produced by the settlement itself? The will referred to a particular marriage, namely, one made under the age of twenty-five with consent, and the settlement was made in reference to that marriage. [LORD GREENE M.R.: Do you say the trustees could have made a settlement under which all the children of any marriage could have participated on any terms?] Yes, it is admitted that the phrase "any children" is not restricted to children of the first marriage, and in the present settlement some provision for the children of a possible second marriage was made, but the first thoughts of the trustees would rightly be given to the children of the marriage giving rise to the settlement, especially as the husband was also settling a fund. It was within the discretion of the trustees to select any one of a number of different settlements including that actually made. It cannot be compulsory to settle on all the children of any marriage equally. [LORD GREENE M.R.: That was what was done in *In re Gowan* (1), a case of great authority, and see *In re Parrott* (2).] It would clearly have sufficed if a settlement has been made on the children of the first marriage subject to a power for the wife, if she survived her husband, to appoint to the children of a subsequent marriage. If the testator had intended the daughter's share to be settled on all the children of any marriage equally, why did not he make the settlement himself instead of leaving the trustees to make a proper settlement? As to what is a proper settlement, see Davidson's Precedents (3rd ed.) vol. iii., part i., p. 655; *Bathurst* v *Murray* (3); and *Spirett* v. *Willows* (4). In *In re Spicer* (5) the trust was in favour of the children, as appears clearly from papers furnished by solicitors in that case. The real intention of the testator here was to give his trustees the same general power of settlement when the daughter married under twenty-five with the guardians' consent as she would have had if she had married after attaining twenty-five years of age. The concluding part of the trusts said to apply " in the event of my said daughter having " any child children or issue of any child or children whether " married with her guardians' consent or otherwise " is inconsistent with the previous trusts declared in case of the marriage of the daughter under twenty-five with the guardians' consent, and it must be disregarded unless it be treated as meeting the case when there was a second marriage when over twenty-five years of age or with consent. The trustees have made a settlement providing for all the children, but preferring to a very great extent the children of the first marriage, and in that they were justified.

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(1) (1876) 2 Ch. D. 44.
(2) (1843) 13 Sim. 445.
(3) (1857) 23 Beav. 450.
(4) (1880) 17 Ch. D. 778.
(5) (1886) 33 Ch. D. 274.
(6) (1889) 42 Ch. D. 54.
(7) [1922] 2 Ch. 558.
(8) (1867) L. R. 4 Eq. 122.

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(1) 17 Ch. D. 778.

(2) 33 Ch. D. 274.

(3) (1801) 8 Ves. 72.

(4) (1869) L. R. 4 Ch. 407.

(5) (1901) 84 L. T. 194.

Christie K.C. replied.

Cur. adv. vult.

Dec. 13. The judgment of the court (Lord Greene M.R., Luxmoore and Goddard L.JJ.) was read by LORD GREENE M.R. The question falling for decision turns on the true meaning and effect of the earlier clause providing for a settlement for the benefit of the daughter and any child she might have, and the final clause providing for the children and issue of the daughter. For convenience we will refer to these two clauses as " the settlement clause " and " the issue clause " respectively.

It is asserted by the defendants to the action that the settlement of August 3, 1869, complied with the directions contained in the will of the testator ; that its provisions are binding and effective ; and that, the daughter not having, as it appears, exercised her power of appointment under the settlement, the trust funds representing her share of the testator's estate belong to the defendants in equal shares. The plaintiffs, the children of the second marriage, contend, on the other hand, that the settlement directed by the testator to be made was one under which all children of the daughter, whether by the first or any subsequent marriage, should be treated on an equal footing ; that the settlement failed to comply with this direction in that, in the events which have happened, the children of the second marriage are excluded ; and that the settlement is, accordingly, to that extent inoperative. They claim, therefore, that, in the events which have happened, the fund is divisible among themselves and the defendants in equal shares. Bennett J. decided in favour of the defendants, his judgment being based entirely on his view as to the true interpretation of the settlement clause and its legal consequences. He quotes the issue clause in his statement of the facts, but he does not refer to it in his reasoning. He does not explain why he considers it irrelevant for the purpose of the question before him. In our opinion, it is the issue clause that is decisive of the controversy.

It is a fundamental rule in the interpretation of wills that effect must be given, so far as possible, to the words which the testator has used. It is equally fundamental that apparent inconsistencies must, so far as possible, be reconciled, and that it is only when reconciliation is impossible that a recalcitrant provision must be rejected. Even in that case, of two irreconcilable provisions, it is the later that prevails, but in the present case there is no need to have recourse to this rule of despair. The settlement clause and the issue clause are separated by a number of other provisions, but such a separation is of frequent occurrence, and it affords no bar to their reconciliation. The settlement clause, taken by itself, is self-contained, and effect could unquestionably be given to it, although the result would in that case be different from that contemplated by the issue clause. The issue clause provides, in clear and unequivocal language, what is to happen to the capital of the fund on the death of the daughter leaving issue, and it applies both to the case where she marries with the consent of the guardians and to that where she marries without such consent. It is impossible to ignore that part of the issue clause which deals with the case of marriage with consent. It must, if possible, be reconciled with the settlement clause, and such reconciliation presents no real difficulty. The issue clause, in our opinion, must be construed as defining the nature of the benefit for the children of the daughter which is to be provided by the settlement which the testator directs to be made on her marriage with the consent of the guardians. The fact that the issue of deceased children are to share under the issue clause, whereas in the settlement clause only children are referred to, does not present, to our minds, any insuperable difficulty. A benefit to the issue of a deceased child can fairly be regarded as a benefit to that child. We come to the conclusion, therefore, that the settlement ought to have been made in conformity with the issue clause. The only alternative is to reject the reference in the issue clause to marriage with consent, and this, in our opinion, is wholly illegitimate.

There remains the question whether the children referred to in the issue clause are only those of the marriage with consent,

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to which the clause refers, or include children of a subsequent marriage. In construing the settlement clause, Bennett J. held that the class of children referred to in it is confined to children of the particular marriage. We need express no opinion as to the correctness of this view, since, on our own view as to the construction of the will, the two clauses must be read together. The language of the issue clause in this connexion does not, in our opinion, admit of any doubt. The phrase used is " in the event of my said daughter leaving any child children " or issue of any child or children " ; and we can see no reason for cutting down the force of the word " any " which prima facie means what it says.

In the result, therefore, on this short ground, we are of opinion that the appeal succeeds, and in the events which have happened the fund is distributable equally among the children of both marriages who survived their mother. Having regard to the view which we take, it is not necessary for us to consider what the result would have been if the settlement clause had stood alone, but it must not be taken from this that we would have accepted the reasoning of Bennett J. as correct. As it is, we need express no opinion on it.

Appeal allowed.

Solicitors : *Burton, Yeates & Hart ; Arthur Pyke & Co.*

H. C. G.

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Dec. 9.

In re BECHER, Deceased.

Administration—Insolvent estate—Secured creditor—Debt secured by mortgages of reversionary interest—Proof of debt—Master's certificate—Increase in value of security—Tender of amount at original valuation—Refusal—Lapse of time—Amendment of proof—Variation of certificate—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *sch. II, rr.* 13 (*a*), 14, 16.

In 1919, a mortgagor of a reversionary interest in a fund appropriated to answer an annuity under a will died. The court ordered administration of his estate, which proved insolvent, and the rules in sch. II of the Bankruptcy Act, 1914, applied. When the master made his certificate, in 1923, 3,265*l.* 3*s.* 11*d.* was due for principal and interest under the mortgages, and the mortgagee valued her security at 2,000*l.* and proved as an unsecured creditor for the balance and certain costs. In 1932 she died, and in 1940 the annuitant under the will died, and 4,350*l.* 15*s.* 0*d.* became payable, subject to the mortgages, to the mortgagor's estate. Action was not taken until 1943. In June, 1943, the solicitors for the mortgagee's personal representatives received from the mortgagor's executrix notice to redeem. They declined her tender of the amount of the assessed value of the security with interest thereon, and demanded the full amount due under the mortgages (4,498*l.* 5*s.* 3*d.*) which the executrix refused to pay. In August, 1943, the mortgagee's surviving executor, who, as such, was a creditor of the mortgagor, applied for an order that he be at liberty to amend the valuation of the security, and the proof, by valuing the security at 4,350*l.* 15*s.* 0*d.*, on the ground that it had increased in value since the valuation, and that the time for varying the master's certificate might be extended and that it might be varied by deleting the mortgagee's name as an unsecured creditor :—

Held, that the court, in granting the application, would disregard the applicant's delay in taking action, and would not allow practice in the Chancery Division with regard to variation of certificates to fetter the exercise of its discretion under the Bankruptcy Act, 1914.

Ex parte Norris, In re Sadler (1886) 17 Q. B. D. 728 followed.

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On February 11, 1919, the mortgagor, under two mortgages, of a reversionary interest in a fund, set aside to answer an annuity under a will, died. On March 17, 1919, an order was made for the administration of his estate, which proved insolvent, and the rules in sch. II of the Bankruptcy Act, 1914, applied (1). On June 27, 1923, the master made his certificate. At that date 3,265*l.* 3*s.* 11*d.* was due for principal and interest under the mortgages. The mortgagee valued her security at 2,000*l.*, and was admitted to prove as an unsecured creditor for the balance, which, with certain costs, amounted to

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(1) Rule 13 provides: "(*b*) Where "a security is so valued" (i.e., in accordance with r. 12) "the "trustee may at any time redeem "it on payment to the creditor of "the assessed value."

Rule 14 provides: "Where a "creditor has so valued his "security, he may at any time "amend the valuation and proof "on showing to the satisfaction of "the trustee, or the court, that ". . . . the security has . . . . "increased in value since its "previous valuation . . . ."

Rule 16 provides: "If a "creditor after having valued his "security subsequently realises "it, or if it is realised under the "provisions of rule 13, the net "amount realised shall be substituted for the amount of any "valuation previously made by "the creditor, and shall be treated "in all respects as an amended "valuation made by the creditor."

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1,274*l.* 12*s.* 11*d.* From time to time she received dividends in respect of that proof. On November 12, 1932, she died, and on June 9, 1940, the annuitant under the will died, and the reversionary interest fell into possession, whereupon 4,350*l.* 15*s.* became (subject to the mortgages) payable by the trustees of the will to the mortgagor's estate. On June 21, 1943, the solicitors to the mortgagor's executrix (the defendant in the administration action) gave to the mortgagee's personal representatives notice to redeem the mortgages for 2,536*l.* 9*s.* 3*d.*, being the assessed value of 2,000*l.*, together with interest thereon from the date of the certificate, after taking into account certain sums which had been received from the trustees of the will in respect of surplus income after keeping down the annuity. On the same date the trustees of the will sent to the mortgagee's personal representatives a banker's draft for 2,536*l.* 9*s.* 3*d.* On July 1, 1943, the solicitors for the mortgagee's personal representatives refused to accept that amount in full payment, and asked for the full sum due under the mortgages, which, with interest to December 5, 1943, amounted to 4,498*l.* 5*s.* 3*d.* That request was not complied with, and, by this summons, which was taken out on August 17, 1943, in the administration action, the mortgagee's surviving executor, who, as such, was a creditor of the mortgagor, asked for an order that he be at liberty to amend the valuation of the security for his debt, and the proof in respect of it, by valuing the security at 4,350*l.* 15*s.* (the total amount due from the trustees of the will) on the ground that the security had increased in value since the valuation, and asked also that the time for varying the master's certificate should be extended, and that the certificate might be varied by deleting the mortgagee's name as a creditor.

Raymond Jennings for the applicant. The court ought to allow the applicant to amend the proof. The trustees of the will are entitled to pay him the whole amount, and, had they done so, the proof would have been automatically amended under r. 16 of sch. II to the Bankruptcy Act, 1914. The court will deal with an insolvent estate in the same way as if it was administering an estate in bankruptcy: *In re McMurdo* (1). It is quite clear that, in the present case, the court ought to make the exact order for which the applicant asks: *Ex parte Norris, In re Sadler* (2).

(1) [1902] 2 Ch. 684.

(2) (1886) 17 Q. B. D. 728.

Droop for the mortgagor's executrix. The payment offered to the mortgagee's executor was quite proper: *In re Bell* (1), and, had he accepted it, that would have been an end of the matter. The debt has been adjudicated, and, in order to give effect to the applicant's claims, the certificate would have to be varied. After the passing of twenty years it ought not to be varied, for that would be contrary to practice. Unless and until it is varied it is binding, and it is quite right that it should remain so, for the nature of the security was the deliberate choice of the mortgagee, and neither she during her life, nor her executor since her death, has suffered any injustice.

Pascoe Hayward for the plaintiff in the administration action adopted the last argument. The application ought to be refused on the ground, also, that the applicant is hopelessly out of time. Three years went by and nothing was done, and only when faced with the notice to redeem did he issue the summons.

UTHWATT J. Authority on the way in which the power of the court ought to be exercised is to be found in *In re Newton* (2). That case deals with bankruptcy, but it applies equally to the administration of estates and shows how the court will act. In the course of his judgment, Vaughan Williams J., referring to *Ex parte Norris, In re Sadler* (3), said: (4) "I think "the Court of Appeal meant to say, as matter of principle, "that the rule" (then r. 13 of sch. II to the Bankruptcy Act, 1883) "ought so to be construed as to give the creditor the "right to amend, unless by something which has happened the "position of the creditor and the trustee has become so altered "that the rights of the parties concerned may be considered to "be fixed on the basis of the alteration. . . . . It is perfectly "clear that the legislature did not mean that the mere fact "that the creditor's security had increased in value since his "valuation of it should take away his right to amend, because "by the very terms of r. 13 he may amend on shewing to the "satisfaction of the trustee or of the court that his security "has increased in value since its previous valuation. . . . . "The creditor has a right to amend until the amount at which "he has valued his security has not only been tendered to him, "but accepted by him." That is a perfectly general statement

(1) [1896] 1 Ch. 1.
(2) [1896] 2 Q. B. 403.
(3) 17 Q. B. D. 728.
(4) [1896] 2 Q.B. 403, 406.

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of the rule, with which I agree, and it is binding on me. It accords with common sense. So long as there has been no real alteration in the position of the parties, nothing irretrievable done, I can see no reason why the applicant should not be allowed to amend. My attention has not been called to any harm which will thereby be done, and there is no indication that anyone will suffer injustice. Indeed, justice clearly demands that leave to amend should be given. The security, by its very nature, is one that must constantly be increasing in value, and the applicant necessarily had to wait to see what its value would be. Further, I pay no attention, therefore, to the long period of three years since the death of the annuitant. True, there was some slackness, but that is not a reason for depriving the applicant of his right to amend. I give him leave, therefore, to amend the valuation of his security in the way he desires with the result that he will cease to be an unsecured creditor for any sum whatever.

It has been contended for the mortgagor's executrix that the debt is an adjudicated debt, that the mortgagee deliberately chose to value her security, that the certificate is binding until it is varied, and that I ought not to give leave to extend the time to vary it. I dissent from that view. The right course in these cases is to decide the question of giving leave to amend the valuation independently of the certificate. The discretion to give that leave is given by the general law, and ought not to be limited by matters of practice in the Chancery Division. Thus, in an administration suit, I approach the question of varying the certificate on the footing that there is discretion to give the applicant leave to amend his valuation, and that that discretion ought to be exercised. If the matter is approached in that way, it becomes easy. I will, therefore, give leave to extend the time to vary the certificate, and, no doubt, in due course the certificate will be varied by ordering that the mortgagee's name as an unsecured creditor be deleted. The applicant will pay the costs of the application.

Solicitors: *Joynson-Hicks & Co.; Shirley Woolmer & Co.; Theodore Goddard & Co., incorporating Smith, Rundell, Dodds & Bockett.*

K. R. A. H.

In re SCHEBSMAN, Deceased.

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Oct. 18, 19, 20;
Dec. 6.

Ex parte THE OFFICIAL RECEIVER, THE TRUSTEE
v.
CARGO SUPERINTENDENTS (LONDON), LIMITED AND SCHEBSMAN.

Contract—Contract for benefit of third party—Performance by payment to third party against wish of obligee.

Bankruptcy—Settlement—Avoidance—Settlement made within two years before bankruptcy—Agreement for payments to debtor's wife and daughter—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 42, *sub-s.* 1.

The debtor was employed by a Swiss company and its subsidiary, an English company. On March 31, 1940, his employment ended, and on September 20, 1940, he entered into an agreement with the companies, by cl. 2 of which: "In consideration of the agreement which has already been made between the parties hereto the English company also agree to pay by way of compensation for loss of the debtor's employment a sum of 5,500*l.* to be paid to the persons at the dates in the amounts and subject to the conditions more particularly specified in the schedule hereto." The schedule began with a list of six sums totalling 5,500*l.* to be paid to the debtor, the first for the year ending March 31, 1941, and the others for the years ending on the five succeeding anniversaries of that date. By paras. (*a*) to (*f*) of the schedule, if the debtor died before the completion of the payments to him, provision was made for payments to his widow of sums varying in amount according to the date of the debtor's death, such sums amounting, with those which would already have been paid to the debtor, in some cases to less, in some cases to more, than 5,500*l.*, while the period of payment, in certain events, was to continue to March 31, 1950. By para. (*h*), if the widow died before March 31, 1950, the schedule should be thereafter read as if the name of the debtor's daughter had appeared throughout instead of that of the widow, and by para. (*i*) on the death of the survivor of the debtor, the widow and the daughter, the payments should cease. On March 5, 1942, the debtor was adjudicated bankrupt. On May 12, 1942, he died. By this motion the official receiver, as his trustee in bankruptcy, asked for a declaration that all sums payable under the agreement to the widow, and, possibly, to the daughter, after the receiving order, formed part of the estate of the debtor, on the grounds that, although the sums were, by the agreement, to be paid to the widow or the daughter, the debtor always had the right to intercept them, which right was at the date of the motion in the trustee, and, secondly, that, if the debtor had not that right, the provision for his widow and daughter was a voluntary settlement made by him which was

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avoided under s. 42, sub-s. 1, of the Bankruptcy Act, 1914, because of his bankruptcy within two years of making it:—

Held, (i.) that the contract did not create a trust in favour of the widow or daughter; (ii.) that the debtor could not by unilateral action have required the company to make the payments to anyone other than the widow and daughter, and that any attempt by him to divert the payments from them would have involved a breach of contract; (iii.) that there was no principle of equity which would assist the trustee in bankruptcy to claim sums which the debtor could not have claimed without a breach of contract; (iv.) that the manifest intention of the contract was that the widow should receive the payments beneficially, and that, the debtor having done all in his power to ensure the receipt by his widow of the intended benefits, and the nature of the transaction precluding the possibility of any subsequent intervention or change of mind on his part, there was an advancement to her and no resulting trust for the debtor's estate; (v.) that there was no settlement by the debtor of any property of his to which s. 42, sub-s. 1, of the Bankruptcy Act, 1914, could apply.

Decision of Uthwatt J. [1943] Ch. 366 affirmed, but in part for different reasons.

In re Stapleton-Bretherton [1941] Ch. 482 explained.

APPEAL from Uthwatt, J.

The appeal concerned the rights of one, John William Schebsman, deceased (hereinafter called "the debtor") and the trustee in his bankruptcy, on the one hand, and the debtor's widow and daughter, on the other, arising under an agreement dated September 20, 1940, made between a Swiss company, of the first part, an English company associated in business with the Swiss company, of the second part, and the debtor of the third part. The recitals in the agreement stated that (a) the debtor had originally been in the service of the Swiss company, (b) that that company had lent the debtor's services to the English company, (c) that the arrangement had subsisted for many years before September 20, 1940, and (d) that the agreement was entered into to define the terms on which the debtor's employment with the Swiss and English companies should be terminated by mutual consent. The agreement provided that (1.) an immediate payment of 2,000*l.* should be made by the English company to the debtor, but out of this sum 600*l.* was to be applied by the English company in discharging certain liabilities of the debtor, (2.) the English company should pay to the debtor by way of compensation for loss of employment a sum of 5,500*l.* which was to be paid in the manner specified in the schedule to the agreement, (3.) the three parties to the agreement should mutually release each other from "all "sums of money accounts actions proceedings claims and "demands whatsoever which any of them at any time had or "has up to September 20, 1940, against the other for or by "reason of any act matter cause or thing save as provided" in the agreement, (4.) the debtor agreed that for ten years he would not either directly or indirectly carry on or be engaged concerned or interested in the business of a cargo superintendent or permit his name to be used in such a business, (5.) if the debtor should commit a breach of any of the stipulations under head (4.) the English company was to have the right to withhold payment in whole or in part of the moneys referred to in the schedule for such period as it should think fit, (6.) the English company would make "all payments due to" the debtor's widow or daughter under the terms of the agreement and (7.) so long as the debtor should remain indebted to a company identified in the agreement the debtor would pay certain premiums in respect of a policy of insurance on his life specified therein, and if at any time any such premium should be in arrear and unpaid, the Swiss company or the English company should have the right itself to make such payments and to withhold payment of any moneys due to the debtor under the agreement until the Swiss company or the English company, as the case might be, should have reimbursed itself. The schedule to the agreement provided for the payment of the sum of 5,500*l.* to the debtor by six annual instalments each payable on March 31 during the years 1941 to 1946 inclusive. It also provided that (a) if the debtor died on or before March 31, 1941, the English company should pay to his widow 500*l.* for each of the four years ending on March 31, 1941 to 1944, inclusive, and 375*l.* for each of the years ending on March 31, 1945 to 1948 inclusive, (b) to (d) if the debtor died during the years 1941–42, 1943–1944, each ending on March 31, the payments to the widow should extend over a period ending March 31, 1948, (e) and (f) if the debtor died during the years 1944–1945, 1945–1946, the payments to the widow should extend over a period ending March 31, 1950—the payments to the widow under (b) to (f) might amount in the aggregate, with any sums paid to the debtor during his life, to more or less than 5,500*l.* as the case might be—(g) the payments to the widow were to be made by equal weekly instalments, (h) if the widow died at any time before March 31, 1950, the schedule should, after the death of the widow, be read as if the name of the debtor's daughter appeared therein

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instead of that of the widow, and (i) all payments under the agreement should cease on the death of the survivor of the debtor, the widow and the daughter. The debtor was adjudicated a bankrupt on March 5, 1942, and died on May 12, 1942. On April 9, 1943, the trustee in bankruptcy launched a motion to which the English company and the debtor's widow and daughter were respondents claiming a declaration that all sums payable by the English company under the agreement of September 20, 1940, formed part of the estate of the debtor.

UTHWATT J. held (1.) that under the agreement the debtor was neither a trustee nor an agent for his wife and daughter (2.) that, as a matter of law, payment to the widow was due performance of the agreement, unless a term was to be implied —which was not the case—entitling the debtor or his sequels in title to intercept the sums agreed to be paid to her; (3.) that the agreement did not constitute a settlement within s. 42, sub-s. 1, of the Bankruptcy Act, 1914. The trustee in bankruptcy appealed

Roxburgh K.C. and *Pennycuick* for the trustee. The question is whether the sums which are expressed to be payable, in the events which have happened, to the bankrupt's widow, or which may become payable to his daughter, by the companies or either of them as compensation for loss of employment by the bankrupt can be intercepted by the trustee or recovered by him from the widow. The answer depends on whether the doctrine pacta tertiis non prosunt applies, and whether s. 42 of the Bankrupcy Act, 1914, applies. It is submitted that Uthwatt J. was wrong in rejecting the proposition that in English law no rights can be conferred by a contract on a third party unless either the circumstances amount to a declaration of trust or the promisee is a trustee or nominee for the third party. The court will, if necessary, be asked to overrule the decision of Simonds J. in *In re Stapleton-Bretherton* (1), on which Uthwatt J. based his decision that there was no trust and that the promisee was not a trustee or nominee of the widow who, therefore, had no rights, but, if the promisor insisted on paying her in accordance with the contract, she was entitled to retain the payment. The judge gave many reasons why the promisor should be entitled to pay, but no reason why the payee should be entitled to retain the payment. If the promisor can pay the third party, the promisee can

(1) [1941] Ch. 482.

recover from the third party, and, in order to avoid circuity of proceedings, the promisee is entitled to direct the promisor to pay him direct. Both Uthwatt J. in the present case and Simonds J. in *In re Stapleton-Bretherton* (1) admitted evidence which was inadmissible of the intention of the parties as to the destination of the money. The court will hesitate long before deciding that the destination of the money depends on the volition of the payor.

The following cases were referred to: *Cleaver* v. *Mutual Reserve Fund Life Association* (2); *In re Engelbach's Estate* (3); *In re Sinclair's Life Policy* (4); *In re Gordon* (5); *In re Webb* (6).

It is submitted that *In re Gordon* (5) is right, and *In re Stapleton-Bretherton* (1) wrong in principle. Section 42, sub-s.1 of the Bankruptcy Act, 1914, may have some bearing. Unless the contract can be construed as creating an equitable interest in the widow, all the authorities show that the husband could at any time have released the contract, and the widow could not have obtained payment. The trustee in bankruptcy is in the same position as the bankrupt and can obtain payment to himself. [Counsel referred to *Norwich Union Fire Insurance Society, Ld.* v. *Colonial Mutual Fire Insurance Co., Ld.* (7); and *In re Harrison and Ingram* (8); and LORD GREENE M.R. to *Mathieson's Trustee* v. *Burrup, Mathieson & Co.* (9)].

Denning K.C. and *G. R. F. Morris* for the widow and daughter. The position in English law can be set out in the following propositions: (1.) It is a fundamental principle that a party is entitled and bound to perform his contract according to its terms; (2.) the promisor is entitled and bound to complete the contract by payment to the widow unless the contract allows payment to the legal personal representative; (3.) no such construction is permissible here; (4.) once payment is made to the widow, there is nothing which requires her to pay it over to anyone else. As to remedies: (1.) The widow cannot sue, because she is not a party; (2.) the legal personal representative can sue, but he does not sue as trustee for the widow who cannot compel him to sue, but, if he does sue, he must hold the money, when recovered, for the person beneficially entitled, i.e., the widow: see *Lloyd's* v. *Harper* (10) and

(1) [1941] Ch. 482.
(2) [1892] 1 Q. B. 147.
(3) [1924] 2 Ch. 348.
(4) [1938] Ch. 799.
(5) [1940] Ch. 851.
(6) [1941] Ch. 225.
(7) [1922] 2 K. B. 461.
(8) [1900] 2 Q. B. 710.
(9) [1927] 1 Ch. 562.
(10) (1880) 16 Ch. D. 290.

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Allen v. *Waters&Co.* (1). On the main point the insurance cases are a difficulty, but it is submitted that *In re Engelbach's Estate* (2) is wrong. [They referred to *United Australia, Ld.* v. *Barclay's Bank, Ld.* (3); *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ld.* (4).] There is no resulting trust in such a case as this: see *In re Flavell* (5), which may be distinguishable; *Ashby* v. *Costin* (6); *In re Davies* (7). The company will, if necessary, refuse to pay anyone. If the legal personal representatives sue, they can recover only nominal damages. If they recovered full damages, they would hold them in trust for the widow: see *Robertson* v. *Wait* (8); *West* v. *Houghton* (9); *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London), Ld.* (10); *Drimmie* v. *Davies* (11); see also the Law Revision Committee's Report, in [1937] W. N. (Misc.) 291–3, and an article by Prof. Corbin in the *Law Quarterly Review*, vol. 46, p. 12, at pp. 38, 39. *In re Stapleton-Bretherton* (12) is discussed in the *Law Quarterly Review*, vol. 58, p. 159. Far from there being any resulting trust in this case, there was clearly intended a trust for the widow and daughter who were to receive weekly payments over a period of years.

[They referred to *In re a Policy of the Scottish Equitable Life Assurance Society* (13).] The debtor, having done all in his power to complete the gift, could not have revoked it. Under the contract the money must vest beneficially in the widow, subject to the point under the Bankruptcy Act. As to that, the widow took out letters of administration, and she is the legal personal representative of her husband, no order having been made for administration in bankruptcy. Section 38 of the Bankruptcy Act defines the property which vests in the trustee. None of this money comes within that. Section 51 deals with pensions and income: see *Ex parte Huggins* (14), Section 42, sub.-s. 1, involves three questions: What was the property? What was the settlement? If the settlement is avoided what is left? It must have been the debtor's own property before the settlement, so that when the settlement is avoided, the property is his. Here it is said that the property is the money the widow receives under the contract. Where

(1) [1935] 1 K. B. 200.
(2) [1924] 2 Ch. 348.
(3) [1941] A. C. 1.
(4) [1943] A. C. 32, 62.
(5) (1883) 25 Ch. D. 89.
(6) (1888) 21 Q. B. D. 401.
(7) [1892] 3 Ch. 63.
(8) (1853) 8 Ex. 299.
(9) (1879) 4 C. P. D. 197.
(10) [1919] A. C. 801.
(11) [1899] 1 I. R. 176.
(12) [1941] Ch. 482.
(13) [1902] 1 Ch. 282.
(14) (1882) 21 Ch. D. 85.

is the settlement of that? If there was a settlement, how was it ever the property of the bankrupt? It is suggested that it operates as an agreement to pay the bankrupt and then an assignment over to the widow, but that is not so. The payments to be made to the widow differ from those to the husband if he had survived.

Raeburn for the companies. One short point goes to the root of the matter. To make out a case under s. 42 of the Bankruptcy Act, the trustee must show that there was a settlement within that section by the debtor of the debtor's property. Here there was never anything capable of construction as a settlement *by the debtor.* The agreement between the debtor and the companies does not constitute a settlement at all, but, if it does, it is a settlement *by the companies*, of the *companies'* property. They provide the money, and they confer the benefits.

Roxburgh K.C. in reply. A company which has contracted for valuable consideration to make payments to a third party cannot be said to be making a voluntary settlement or a gift. There is not a word in the document to indicate a beneficial interest in the payee. Successive interests are not in themselves enough to create a trust.

Cur adv. vult.

Dec. 6. The following judgments were read:

LORD GREENE, M.R. I will deal first with the situation apart from s. 42 of the Bankruptcy Act.

The first question which arises is whether or not the debtor was a trustee for his wife and daughter of the benefit of the undertaking given by the English company in their favour. An examination of the decided cases does, it is true, show that the courts have on occasions adopted what may be called a liberal view on questions of this character, but in the present case I cannot find in the contract anything to justify the conclusion that a trust was intended. It is not legitimate to import into the contract the idea of a trust when the parties have given no indication that such was their intention. To interpret this contract as creating a trust would, in my judgment, be to disregard the dividing line between the case of a trust and the simple case of a contract made between two persons for the benefit of a third. That dividing line exists, although it may

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not always be easy to determine where it is to be drawn. In the present case I find no difficulty.

I will now turn to the other questions which arise. At the outset of his address Mr. Roxburgh suggested that the trustee in bankruptcy as claiming through the debtor could claim all sums paid by the English company to Mrs. Schebsman or her daughter as money had and received to his use. As the discussion proceeded, this argument was abandoned by Mr. Roxburgh and rightly so. The transaction gave rise to no such privity between these ladies and the debtor as would support a claim against them for money had and received. It was also conceded that at common law the English company is bound, as between itself and the trustee, to make payments to Mrs. Schebsman or her daughter in accordance with the contract, and that the trustee, as claiming through the debtor, has no right at common law to require the company to pay these sums to himself. The contract was tripartite and its terms could only be varied by the consent of all three parties. Mrs. Schebsman and her daughter have, of course, no right to demand payment from the English company since they are no parties to the contract. When the company makes a payment to one of them it is, as between the company and the payee, a gratuitous payment made with the intention of passing the property in the money paid, and this is sufficient to give to the payee at common law a good title to the money against the whole world. The question of what damages could be recovered by the representatives of the debtor if the company were to break its contract has no bearing on anything that we have to decide. Mr. Roxburgh's argument, as he developed it, rests entirely on equitable principles. It may be summarized as follows: The debtor provided the whole of the consideration for the English company's undertaking to make the payments to his widow and daughter. These payments must, therefore, be regarded in the same light as voluntary gifts. In the case of a completed transfer of property by a man to his wife or daughter a presumption of advancement arises, but in the present case the transfer was not completed since Mrs. Schebsman and her daughter have no title to demand payment to themselves. It was, therefore, possible for the debtor in his lifetime, and for the trustee, as his representative, to intervene at any time and to assert as against Mrs. Schebsman and her daughter that any payments thereafter made to either of them would be held by the payee on behalf of the debtor's estate. The effect of such an intervention, it was said, makes it impossible to treat any money in fact received thereafter by Mrs. Schebsman or her daughter as an advancement. If, notwithstanding the intervention, the company makes a payment to either of them, there will be a resulting trust for the trustee as representing the debtor. As a corollary to this it was said that in properly constituted proceedings the English company can be compelled to make the covenanted payments direct to the trustee. The case, it was said, is analogous to that of an uncompleted gift or that of an imperfectly constituted trust. Mrs. Schebsman and her daughter are mere volunteers and equity will do nothing to assist them.

This argument is attractive but, in my opinion, fallacious. It is important to bear in mind at the outset that, as between himself and the English company, the debtor had no right to intervene and direct the company to make the payments to someone other than Mrs. Schebsman or her daughter. As between the three parties to the contract, its terms were that the payments should be made to Mrs. Schebsman and her daughter, and made to them, clearly, for their own benefit. If, therefore, the debtor in his lifetime had directed the company to make these payments to his executors, the company would have been entitled to ignore the direction. The proposition that in properly constituted proceedings the trustee could obtain direct payment to himself depends for its validity on the truth of the proposition that, as between himself and Mrs. Schebsman and her daughter, the trustee is entitled to claim the money as his own. The former proposition cannot, therefore, be relied on to establish the latter proposition which must be made good if at all, on its own merits. Indeed, the former proposition relates to procedure only, and means nothing more than that, if A is proposing to pay money to B which, as between B and C, belongs in equity to C, C can join A as a defendant in his action against B and thus procure payment by A direct to himself. It throws no light on the question which, for our purposes, is the relevant one, namely, as between B and C, does the money belong in equity to C?

We must, therefore, consider the position as between the debtor and his wife and daughter. I do not think that any help is obtained by considering the cases of uncompleted gifts or imperfectly constituted trusts. Indeed, these analogies seem to me to be misleading. If A instructs an agent to carry a present to B, the agent's authority is in its nature revocable

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and A can revoke his instructions at any time before the present is delivered. Similarly, if A is minded to create a trust in favour of B, a volunteer, and fails properly to constitute the trust, B has no remedy, but the present case is quite different. When he made the contract the debtor did not constitute the English company his mandatory to transfer property of his own to his wife and daughter. Not only was the money in question never his property, but, once having made the contract, he had, as I have already pointed out, no right to call on the company to make the payment to his estate. In making the contract he set in motion a piece of machinery which he had no power to stop by his own unilateral action save by releasing the company from the contract. Its operation would inevitably result in money reaching the hands of his widow and daughter, assuming, as we must assume, that the English company would perform its contract. This, therefore, was no revocable mandate, nor was there any lack of completeness in the constitution of the machinery devised for securing these benefits for the widow and daughter. When he made the contract, the debtor intended that his widow should receive those benefits for herself. It was part of the bargain between himself and the two companies that she should receive them, and he reserved to himself no right to call for payment to himself. The trustee could, presumably, release the company from its undertaking, but this would do no more than deprive the trustee of the right to sue for damages for its breach. The fact that such a release can be effected is no argument for saying that the trustee can claim the moneys as his own.

The question, therefore, is not: "Will equity help the "widow and daughter to retain the sums which will inevitably "be paid to them?" but "Will equity help the trustee in "bankruptcy to recover them from the payees?" I can find no principle which calls for an affirmative answer to this question. If it were otherwise, the result would be a curious one. The debtor makes a contract intended to secure benefits for his wife and daughter after his death. It is true that they obtain no right to call for those benefits, but the debtor with good reason trusts the company to make them. The company cannot avoid making them unless it is prepared to break its contract. In this confidence, let me assume, the debtor makes his testamentary dispositions and dies with the satisfaction of knowing that the contract makes provision for his widow and daughter. It is said that his representative can abrogate his intention and call on his widow and daughter to pay over to his estate any sums they may receive and that equity will compel them to do so. In my opinion, no principle of equity requires this to be done.

It is, of course, true that the debtor provided part of the consideration for which the English company gave its undertaking to make the payments, but he did so with the intention that the money paid should belong to the recipients beneficially, and in this sense the provision secured by the contract for the widow and daughter may perhaps be regarded as being an advancement to them. This was clearly his intention at the date of the contract. It is true that at that date and down to the date of his death all that Mrs. Schebsman and her daughter had was an expectancy. They had no legal rights whatever, but it was an expectancy that would necessarily mature into actual payment, subject always to the possibility that the three parties to the contract or their representatives might put an end to the contract by mutual consent and the possibility that the debtor or his successors in title might release the company from its obligation. This being so, the advancement must, in my opinion, be regarded as completed when the contract was made, since it was not in the power of the debtor to change his mind and prevent it from becoming effective unless he could secure the agreement of both the other two parties to the contract or was prepared to release the company. I do not see how there can arise a resulting trust for the debtor of money that was never his, the receipt of which by the payees he had no power by himself to prevent save by a release.

To say that there can be no effective advancement unless and until either the subject-matter reaches the hands of the person to be advanced, or that person acquires a legal title to claim it, appears to me to be too narrow a proposition. I see no reason why in principle an advancement should not be regarded as complete and effective where the person desiring to make it sets in train for that purpose a process which it is out of his power to control by his own action. If the process is one which he can by his own action control as, for example, where he uses a mandatory to deliver the subject-matter of the advancement to the person whom he desires to benefit, the case is, of course, different, but where a person has done everything which the nature of the subject-matter permits to ensure that it will reach the object of his bounty, and the nature of the transaction precludes the possibility of any subsequent intervention or change of mind on his part, the advancement must, in my opinion, be regarded as complete. In the present case the special nature of the transaction satisfies these tests. The circumstances that the three parties to the contract could put an end to it by mutual consent and that the company could be released are immaterial. They mean no more than that limited powers of revocation are provided. If, and only if, one or other of those powers is exercised, can the intended advancement be prevented from taking effect. Cases of advancement made by such methods as these may be rare, but that is no reason for refusing to give effect to them when they occur.

There appears to me to be an additional reason why equity should not interfere. It is a fair inference from the form and substance of the contract that the two companies had themselves an interest in seeing that the widow and daughter of their employee should be provided for. The manner in which compensation should be provided for the loss by the debtor of his employment was agreed between the three parties to the contract. The contract on its face could only mean that the sums payable to Mrs. Schebsman and her daughter are to be paid to them for their own benefit. How can the debtor claim them for himself without breaking his contract ? I do not see how he can, and, if this view be correct, it cannot be that as between himself and the payees the debtor can be heard to assert in a court of equity a claim the enforcement of which involves a breach of contract even when that contract is one to which Mrs. Schebsman and her daughter were not parties.

The only case cited to us which bears any resemblance to the present on the facts is a recent decision of Simonds J. in *In re Stapleton-Bretherton* (1). In that case two brothers, Frederick and Edmund, executed a deed of covenant under which (1.) Frederick covenanted with Edmund that if he, Frederick, succeeded as tenant for life to certain settled property he would during his life pay to Edmund and after the death of Edmund to his widow the annual sum of 1,000*l.*, (2.) Edmund covenanted with Frederick that in certain events if Edmund should succeed to the settled property as tenant for life he would pay certain annual sums during his life to the widow and daughters of Frederick. The events mentioned in Edmund's covenant took place and he succeeded to the settled property. The executors of Frederick claimed that the sums payable by Edmund were payable to the estate of Frederick. The widow and daughters claimed payment to themselves. Simonds J. held, in the first place, that no trust was created in favour of the widow and daughters of Frederick. He answered the question raised by the amended summons by declaring that the executors of Frederick were not entitled to direct Edmund to pay the covenanted sums to them instead of to the persons named in the deed. Now, it is to be observed that the only question which Simonds J. decided was whether Edmund was entitled to perform his covenant according to its terms or whether the executors of Frederick were entitled to require Edmund to perform it in a different way, namely, by payment to themselves. Regarded strictly, the decision does not on its face determine the question whether the wife and daughters, when they received payment, would hold the sums paid in trust for the executors of Frederick. No such claim was in terms put forward. Mr. Hunt, for the executors, argued that, as they alone could enforce the covenant, they alone could give a valid receipt, and, therefore, that they were entitled to require payment to themselves. He did not suggest that, if that argument failed and Edmund was entitled to pay the widow and daughters, the latter would hold the sums as trustees for the estate under a resulting trust, no doubt because it was realized that, once the right of the executors to claim payment to themselves was negatived, it followed as a matter of course that payments received by the widow and daughters would belong to them beneficially. This must have been the significance which Simonds J. attached to his decision. If it were not so, the decision would have been of no practical value to anyone. All the parties interested were before the court, and the question of a resulting trust in favour of the executors could and ought to have been raised and decided. Nevertheless, it must be conceded that, however obvious the view of Simonds J. was that sums paid to the widow and daughters would belong to them beneficially, he did not in terms decide the point nor was it argued before him, but I find in the decision much support for the view which I take in the present case, both because the facts present a substantial similarity in essential respects and because of what Simonds J. must have visualized as the inevitable result of the decision.

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(1) [1941] Ch. 482.

We were referred to several cases in which insurance policies were taken out in favour of third persons. I do not propose to examine them in detail. The distinction between those cases and the class of case which we have to consider is pointed

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out by Simonds J. in *In re Stapleton-Bretherton* (1). His reasoning commended itself to Uthwatt J. and it commends itself to me, but there is one case which was particularly relied on by Mr. Roxburgh, namely, *In re Engelbach's Estate* (2), a decision of Romer J. In that case a testator had taken out an endowment policy under which a sum was expressed to be payable to his daughter (described in the policy as "the "nominee"), her executors, administrators or assigns if she should survive a certain date, which was, in fact, one month after her twenty-first birthday, she being aged one month at the date when the policy was taken out. In the proposal form the testator inserted his own name as proposer "for his "daughter . . . . aged one month." The testator died some years before the stated date, the policy having in the meanwhile been converted into a fully paid policy. All premiums payable under the policy had been paid by the testator. The contest arose between the trustees of the testator's will and the trustees of a settlement to whom the daughter had purported to assign the policy moneys. It was held that the moneys belonged to the trustees of the will. Romer J. held that the testator entered into the contract "in his own name "and on his own behalf but for the benefit of his daughter" by which expression he meant to negative the argument that the testator was acting as trustee or agent for his daughter. He also held, relying on observations made in this court in *Cleaver* v. *Mutual Reserve Fund Life Association* (3), that "the mere fact that the policy moneys are expressed to be "paid to somebody other than the assured does not make the "assured a trustee of the policy or of the policy moneys for "the person so nominated" (4). I do not question the correctness of the decision on the particular facts of that case, and I agree with the explanation of it and the other insurance cases given by Simonds J. in *In re Stapleton-Bretherton* (1). The passage in the judgment of *In re Engelbach's Estate* on which Mr. Roxburgh relied is as follows (5): "The daughter "could, of course, successfully claim these moneys if she had "at the death of the testator a legal right to them, that is to "say a right at law to recover the moneys from the society, "because, although that legal right might have been given to "her purely voluntarily by her father, still there would be no

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(1) [1941] Ch. 482.
(2) [1924] 2 Ch. 348.
(3) [1892] 1 Q. B. 147.
(4) [1924] 2 Ch. 348, 353.
(5) [1924] 2 Ch. 348, 351.

"resulting trust in favour of the father, seeing that there "would be a presumption of advancement." If this means, as Mr. Roxburgh says it means, that there cannot be a case of advancement unless either the subject-matter is delivered to the person to be advanced or that person is given a legal right to claim it, I must respectfully disagree with it for reasons which I have already given earlier in this judgment.

It will be seen that my reasons for agreeing with the decision now under appeal follow different lines from those on which it was based by Uthwatt J. The reason is that before us the case for the appellant was founded on arguments different, apparently, from those with which Uthwatt J. dealt in his judgment. I agree with the reasoning of Uthwatt J., but I have had to deal with the case from a different angle.

The other argument on behalf of the trustee was based on s. 42 of the Bankruptcy Act, 1914. I agree with the decision of Uthwatt J. on this point and adopt his reasons as my own. The sums in question were never property of the debtor. He never had any right to them, either at law or in equity, and I cannot see how he can be said to have settled them on his wife and daughter. True it is that the effect of the contract, assuming that the company performed it, was to bring these sums into the hands of the widow and daughter and that the machinery provided has resulted in a benefit to them, but this does not mean that they were the debtor's property or that the contract was a settlement within the meaning of the section. The section clearly deals with property which, but for the settlement, would have been available to pay the debts of the settlor. These sums never would have been available for that purpose. The appeal is dismissed with costs.

LUXMOORE L.J. (after stating the facts): Before Uthwatt J. it was argued on behalf of the trustee in bankruptcy that the debtor's estate was entitled to the benefit of all provisions in the agreement for payment of moneys to the widow or daughter, and reliance was placed on the decisions in *In re Sinclair's Life Policy* (1), and *In re Engelbach's Estate* (2). It was argued, in the alternative, that the debtor, on entering into the agreement became entitled to a chose in action, namely, the obligation to pay money undertaken by the English company, and that the assignment of that chose in action was effected by the debtor simultaneously with the procuring of it, that

(1) [1938] Ch. 799.

(2) [1924] 2 Ch. 348.

the assignment of the interest took the form of choosing the wife and daughter to receive the payments for their own benefit, and that the assignment constituted a settlement of property which is avoided by s. 42, sub-s. 1, of the Bankruptcy Act, 1914. For the widow and daughter it was contended that on the true construction of the agreement a trust was constituted under which the widow and daughter were the cestuis que trustent, or, alternatively, the debtor was the agent of the widow and daughter to procure their respective benefits under the agreement. The English company contended that, although neither the widow nor daughter could sue it for performance of the contract, the company was entitled to insist on strict compliance with the terms of the agreement by making the stipulated payments as and when they fell due to the widow or daughter. Uthwatt J. held that no trust was created by the agreement, nor did the debtor enter into it, so far as the benefits for the widow or daughter are concerned, as agent for either of them : that all payments made to the widow or daughter, although they were strangers to the agreement, were in due performance of it unless, on the true construction of the agreement, there ought to be implied a term entitling the debtor or his sequels in title to intercept the payments agreed to be made to them—in so holding he followed and applied the decision of Simonds J. in *In re Stapleton-Bretherton* (1) : and that in construing the agreement it was irrelevant to consider what might be the legal consequences of non-performance, and that, on its true construction, no such term as suggested on behalf of the trustee in bankruptcy could be implied. He further held that there was no settlement of property in favour of the wife or daughter which could be avoided under s. 42, sub-s. 1, of the Bankruptcy Act, 1914. In the result, the judge dismissed the motion with costs.

The trustee in bankruptcy has appealed to this court. The arguments here differed in some particulars from those submitted in the court below. Mr. Roxburgh first argued that all payments under the agreement, when made to the widow or daughter, were recoverable by the trustee in bankruptcy as money had and received on behalf of the debtor. After some discussion he abandoned (and as I think rightly) this argument, and relied on two contentions which he put in the form of a dilemma. He claimed that there was in equity a

(1) [1941] Ch. 482.

resulting trust in favour of the debtor and his sequels in title in respect of any moneys paid to the widow or daughter because the debtor had provided the whole of the consideration for such payments, and that there could be no advancement in favour of the wife or daughter because, before the payments sought to be recovered were made, the trustee in bankruptcy had required that all future moneys payable to the widow or daughter were to be paid to him. If he was wrong in the contention that there was no advancement to the wife or daughter he urged that the debtor had made a settlement of property within two years of his bankruptcy and that this was avoided by the Bankruptcy Act. He argued that he must succeed on one or other head. Mr. Roxburgh contended that in a properly constituted action to which the widow and daughter and the English company were parties, after having called on the widow and daughter to account for all payments made to them, the trustee in bankruptcy could obtain either an order of the court restraining the English company from paying any moneys under the agreement otherwise than to himself or an order directing the widow and daughter to account to him for all moneys payable to them. He conceded, as I think he was bound to do, that at common law the English company was entitled to perform the precise terms of the contract by making the stipulated payments to the widow or daughter, as the case might be, but he said that the position was different in equity.

The whole of these arguments is based on the contention that the consideration for the payments to the widow and daughter was provided solely by the debtor, and the widow and daughter must be treated as if the debtor had purchased these benefits for them respectively. If this foundation fails, as I think it does, then the arguments fail with it. In my judgment, the consideration for the agreement was mutual and was contributed by each party to it. Both the English company and the Swiss company agreed to release the debtor in respect of certain matters to which I have already referred, and it would be impossible for the debtor's sequels in title to insist on payment of any of the moneys agreed to be paid to the widow or daughter unless the agreement were altered by mutual consent. In face of the refusal of the English company to depart from its terms the English company can properly insist on carrying out the contract literally. It appears to me that the provisions for the widow and daughter are the result of the mutual agreement and that the debtor had, in conjunction with the English company and the Swiss company, done all that was necessary to complete the title of the widow and daughter to whatever might be payable to them or either of them under the agreement. On payment to the widow or daughter the legal title to each payment was complete, and I can see no equity to support the contention that there is any resulting trust in favour of the trustee in bankruptcy, for the payments result from the mutual agreement and not from a purchase or quasi-purchase by the debtor.

Reliance was placed by Mr. Roxburgh on the decision of Romer J. in *In re Engelbach's Estate* (1). In that case an endowment policy was taken out by a father. In the proposal form the father inserted opposite the words "Full name and "description of the proposer" the words: "Edward Coryton "Engelbach for his daughter Mary Noel, aged one month." By the policy the sum assured was expressed to be payable to the testator's daughter (therein called "the nominee"), her executors, administrators or assigns if she should survive a specified date. The father died before that date, the daughter survived it, and the insurance company paid the sum assured to the daughter. Romer J. held that this sum formed part of the father's estate and ordered it to be paid to his executors. The basis of this decision appears to be that on the true construction of the policy the insurance company was nothing more than the mandatory of the father in making the payment to the daughter, and on this footing the decision has no application to the present case.

The other points argued in the case, including that arising under s. 42, sub-s. 1, of the Bankruptcy Act, 1914, were dealt with by Uthwatt J. in his judgment. I agree with the conclusions he came to with regard to them and with the reasons he gave for those conclusions, and I see no necessity for attempting to restate them. I am content to adopt them as my own. I agree that this appeal fails with the usual consequences.

DU PARCQ L.J.: It is, in my opinion, convenient to approach the problems raised in this appeal by first considering the position of the parties at common law. It is clear that Mrs. Schebsman, who was not a party to the agreement of September 20, 1940, acquired no rights under it and has never been in a position to maintain an action on it. It is common ground, also, that the personal representatives of the debtor could not have recovered any sums which had been paid to Mrs. Schebsman under the agreement as money had and received or by any process known to the common law. It is not disputed that the English company, which under the agreement was liable to make the payments, properly performed that agreement by paying into the hands of Mrs. Schebsman those sums which it had bound itself to pay to Mrs. Schebsman, and, at common law, could not be called on to pay them to the personal representatives of the debtor. Nor, I think, is it disputed, and it may be said to be self-evident, that the English company's agreement to pay these moneys into the hands of Mrs. Schebsman was a valid agreement, a breach of which would be regarded by the courts as an "unlawful act" and a "legal wrong." I borrow these expressions from a well-known passage in the speech of Lord Lindley in *S. Wales Miners' Federation* v. *Glamorgan Coal Co.* (1). The rules according to which damages for breach of contract are assessed sometimes allow a person guilty of the legal wrong constituted by the breach to escape very lightly, but that fact does not affect the illegality of his act.

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(1) [1924] 2 Ch. 348.

So far there is general agreement. I may now express my own agreement with a proposition submitted by Mr. Roxburgh. He said that the duty to pay into the hands of a nominated person is discharged when the money has been paid to that person, and that the party bound to make a payment has no control over its destination. As a general proposition, that is true and can hardly be questioned. In the case before us Mrs. Schebsman, being no party to the contract, is clearly under no obligation to the English company to apply the money in any particular way, nor is the English company concerned with any agreement which she may choose to make with third parties binding herself to apply it in a particular manner, but the proposition, accurate as it is, may be misleading unless it is considered together with another proposition which I take to be equally unexceptionable and which I will now state.

It is open to parties to agree that, for a consideration supplied by one of them, the other will make payments to a third person for the use and benefit of that third person and not for the use and benefit of the contracting party who provides the consideration. Whether or not such an agreement has been made

(1) [1905] A. C. 239, 253.

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in a given case is clearly a question of construction, but, assuming that the parties have manifested their intention so to agree, it cannot, I think, be doubted that the common law would regard such an agreement as valid and as enforceable (in the sense of giving a cause of action for damages for its breach to the other party to the contract), and would regard the breach of it as an unlawful act. If the party from whom the consideration moved somehow succeeded in intercepting a payment intended for the named payee he would be guilty of a tort, and, in certain circumstances, of a crime, and he would also be breaking his contract, since it would be implicit in his agreement with the other party that he would do nothing to prevent the money paid from reaching the payee. If he sought to argue that because he had himself provided the consideration he alone was interested in the destination of the money, the answer would be that the other contracting party had not agreed (and, perhaps, might never have thought of agreeing) to make a payment either to him or for his benefit. If he can persuade the payee to hand the money over to him by lawful means, he is, of course, at liberty to do so, and there may be circumstances dehors the contract which give him rights against the payee. Subject to that qualification, he can never, in the case of such a contract as I have supposed, lawfully claim payment of the money for himself while the contract remains unaltered. That the common law allows it to be varied nobody doubts. At any time the parties may agree that payment shall in future be made, not to the payee named in the contract, but to the party from whom the consideration moved, or, for that matter, to any other person, but in the case of such a contract there cannot be a variation at the will of one of the parties any more than a condition introduced into a contract for the benefit of both parties can be waived by only one of them.

I have said that the question whether a contract imposes a liability on one of the parties to confer a benefit on a third party, not privy to the contract, is always one of construction. From the point of view of the common law, with which alone I am now dealing, I have no doubt that the general rule of construction laid down by Blackburn J. in *Burges* v. *Wickham* (1) must be applied. According to the general law of England the written record of a contract must not be varied or added to by oral evidence of what was the intention of the parties.

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(1) (1863) 3 B. & S. 669, 696.

I now turn to the agreement in the present case to seek in the document itself the answer to the question whether the parties intended that, after the debtor's death, the company should be under an obligation to make payments to Mrs. Schebsman for her own benefit, and the debtor's personal representatives should be under a corresponding obligation to accept payment to Mrs. Schebsman for her own benefit as a fulfilment of the contract. It seems to me to be plain on the face of the contract that this was the intention of the parties. In this connexion the most striking feature of the agreement, in my opinion, is that after the deaths of Mrs. and Miss Schebsman (assuming that the debtor were to predecease them, as, in fact, he did) all payments were to cease, even though a large part of the amount payable by the company might remain unpaid. This provision points clearly, as it seems to me, to the conclusion that both parties were concerned with benefiting Mrs. Schebsman and the daughter, and that the company did not intend to bind itself to pay a penny for the benefit of the debtor's estate after the death of these ladies. It is impossible, in my judgment, to regard this as in effect an aleatory contract under which the amount of payments intended to accrue for the benefit of the debtor's estate was to be dependent on events so uncertain as the duration of the two lives. Further, it is, I think, proper to have regard to the fact that, in the circumstances disclosed by the agreement itself, both parties might be expected to wish to confer a benefit on the debtor's dependents. Lastly, I attach some importance to the language of cl. 6 which speaks of payments " due to " Mrs. and Miss Schebsman.

I may now summarize the position at common law as follows : 1. It is the right, as well as the duty, of the company to make the prescribed payments to Mrs. Schebsman and to no other person. 2. Mrs. Schebsman may dispose of the sums so received as she pleases and is not accountable for them to the personal representatives of the debtor or to anyone claiming to stand in the shoes of the debtor. 3. If anyone standing in the shoes of the debtor were to intercept the sums payable to Mrs. Schebsman and refuse to account to her for them, he would be guilty of a breach of the debtor's contract with the company. 4. The obligation undertaken by the company cannot be varied at the will of the other party to the contract,

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but may be varied consensually at any time although the debtor is no longer living, as it could have been in his life-time.

It now remains to consider the question whether, and if so to what extent, the principles of equity affect the position of the parties. It was argued by Mr. Denning that one effect of the agreement of September 20, 1940, was that a trust was thereby created, and that the debtor constituted himself trustee for Mrs. Schebsman of the benefit of the covenant under which payments were to be made to her. Uthwatt J. rejected this contention, and the argument has not satisfied me that he was wrong. It is true that, by the use possibly of unguarded language, a person may create a trust, as Monsieur Jourdain talked prose, without knowing it, but unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention. I have little doubt that in the present case both parties (and certainly the debtor) intended to keep alive their common law right to vary consensually the terms of the obligation undertaken by the company, and if circumstances had changed in the debtor's life-time injustice might have been done by holding that a trust had been created and that those terms were accordingly unalterable. On this point, therefore, I agree with Uthwatt J.

It was contended by Mr. Roxburgh, in an attractive and (to me) instructive argument, that, although the company might be bound to make payments to Mrs. Schebsman, she must necessarily be held liable in a court of equity to hand over the money she received to the debtor's representatives on the ground that the debtor had provided all the consideration for the payments so that there was a resulting trust in his favour. If I am right in the views which I have expressed as to the position of the parties at common law it seems to me plain that this contention cannot prevail. Mr. Roxburgh submitted that on facts identical with the present, notice having been given to the company that the debtor's representative required payment to be made, not to Mrs. Schebsman, but to himself, a court of equity before the Judicature Acts (1.) would have been prepared to restrain the company from making a payment to Mrs. Schebsman, or (2.) supposing that, notwithstanding the notice, the company had made the payment, would have treated Mrs. Schebsman as a bare trustee and compelled her to pay the money which she had received to the debtor's estate. Now, it follows from what I have already said that by taking the first course the court of equity would have prevented the company from doing what the contract permitted and required it to do. By taking the second course the court of equity would have permitted and assisted the debtor's representative to break the contract which he was bound to perform. There is, I believe, no instance in which equity compels a man to pay money to someone other than the person to whom alone, and for whose sole benefit, he has bound himself to pay it. Mr. Roxburgh sought to find an analogy in the case of an equitable assignment, but what a court of equity did in such a case was, not to compel the debtor to pay the assignee, but to compel the assignor to allow the assignee to sue in the assignor's name. There is certainly no case in which a court of equity has given its protection to a suitor asking to be relieved from the due performance of a contract which was neither unlawful nor unconscionable. To put the matter bluntly, and, if my view of the common law is right, fairly, equity, which mends no man's contracts, will not assist any man to commit a breach of contract and so to do an illegal act. In such a case as that now before us there cannot be a resulting trust since the party who provided the consideration is bound by the terms of his bargain to permit the payee to retain the money and would be acting unconscionably if he diverted it to himself against the will of the payee, save with the consent of the other contracting party.

Even if I am wrong in thinking that the present contract is, on the face of it, to be construed as imposing on the company an obligation to confer a benefit on Mrs. Schebsman and on the debtor an implied obligation to do nothing to deprive her of that benefit, the same result follows when it is conceded (as it was rightly conceded at the bar in this case) that at common law no action could be maintained against Mrs. Schebsman for money had and received, or, in other words, that, according to the common law, she is entitled to retain the money paid to her as against the debtor's estate. When an attempt is made to recover such payments on equitable principles, I am of opinion that the strict rule of evidence, to which I have referred as prevailing when the sole issue is the construction of the contract, is no longer to be applied, and that the court may, and often should, look beyond the four corners of the document. In the words of James L.J. in *Fowkes* v. *Pascoe* (1):

(1) (1875) L. R. 10, Ch. 343, 349.

"Where the Court of Chancery is asked, on an equitable "assumption or presumption, to take away from a man that "which by the common law of the land he is entitled to, he "surely has a right to say: 'Listen to my story as to how "'I came to have it, and judge that story with reference to "'all the surrounding facts and circumstances'." On this principle Uthwatt J. in the present case, and Simonds J. in *In re Stapleton-Bretherton* (1) were right to admit evidence as to the surrounding facts. When that evidence is considered it seems to me impossible to escape from the conclusion that, as matters now stand, anyone standing in the shoes of the debtor would be guilty of a breach of faith if he contrived to intercept the payments due to Mrs. Schebsman. I need hardly add that there is no equitable doctrine on which, in such circumstances, he could be permitted to rely. On the contrary, there is one known to every student which would disqualify him from access to equity.

It now remains to consider whether the trustee in bankruptcy is entitled to the advantage which he seeks to obtain from s. 42 of the Bankruptcy Act, 1914. In my opinion, he is not. On the view which I take of the transaction the debtor never acquired a right to the sums which were to be paid to Mrs. Schebsman. All he acquired was a right to insist on those payments being made, not to himself, but to her. If it is said that he named her as the person to whom he wished the payments to be made, it may equally well be said that the company named her as a person, and in certain events, the only person, to whom, and for whose benefit they would promise to make the payments. The fact is that she was the person whom both parties agreed to make the beneficiary of the contract. The money payable to her was never the "property" of the bankrupt, and it was never in his power to "transfer" it to her.

For these reasons I agree with the conclusion at which Uthwatt J. arrived. My reasons do not, I think, differ much in substance from his, though I fear that I have expressed them at greater length. I have done so partly in deference to the very able argument of Mr. Roxburgh, who put forward the criticism that Uthwatt J. had not considered or sufficiently dealt with the question whether, after receiving the money, as she lawfully might, Mrs. Schebsman was entitled in equity to retain it. I have endeavoured to deal fully with that aspect of the case. I have only to add, with reference to one of Mr. Roxburgh's arguments, that no suggestion was made in this case against the good faith of the parties to the contract. A debtor with an eye to a future bankruptcy might, of course, find a complacent friend who would assist him by entering into a colourable agreement under which the debtor's earnings were to be put out of his creditors' reach. Fraud commonly simulates honesty. That is no reason for refusing to give full effect to an honest agreement. The law has ample power to deal with cases of fraud. I agree that the appeal should be dismissed.

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(1) [1941] Ch. 482.

Appeal dismissed.

Solicitors: *Tarry, Sherlock & King; Morris, Ward-Jones, Kennett & Co.; Albert M. Oppenheimer.*

J. W. H.

In re PARNELL, Deceased.

Considered. Re COXEN. [1948] Ch. 747

RANKS *v.* HOLMES.

UTHWATT J.
1943
Dec. 2.

Will—Construction—Residue—Payment of settled legacies out of fund—"Remainder"—Lapse of a settled legacy—Inclusion in gift of "remainder."

By her will a testatrix, who died in 1907, after giving a number of pecuniary legacies, gave all other her real and personal estate to trustees for conversion and investment, and then directed them to hold the "residuary trust fund" upon trust to invest the same and to stand possessed, inter alia, of 2,000*l.* in trust to pay the income to her nephew and after his death to divide the capital between his children and "as to all the remainder of the residuary "trust fund . . . . in trust for H. D. N." The nephew having died a bachelor:—

Held, that the sum of 2,000*l.* settled on him and his children must be added to the "remainder" of the residuary trust fund and pass to the executor of H. D. N., who was now dead.

Rule stated in Hawkins on Wills, 3rd ed., p. 53, approved.

ADJOURNED SUMMONS.

By her will, dated January 19, 1904, the testatrix, Fanny Matilda Parnell, after bequeathing certain specific and pecuniary legacies, devised and bequeathed all other her real and personal estate unto her trustees upon trust for sale and conversion and

UTHWATT J.

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PARNELL *In re.* RANKS *v.* HOLMES.

investment of the proceeds. She then directed that her trustees should "stand possessed of the residuary trust moneys and "investments for the time being representing the same (herein-"after called 'the residuary trust fund') in trust as to the "sum of 2,000*l.* part of such residuary trust fund to invest the "same and to stand possessed of the said sum of 2,000*l.* and "the investments thereof upon the trusts following, that is "to say, in trust to pay the income thereof to my brother "Edward Parnell during his life and after his death in trust "to divide the capital representing the said sum of 2,000*l.* "equally if more than one amongst the surviving children "of the said Edward Parnell and if there shall be only one "such child the whole to be in trust for that one child." She then settled a further sum of 2,000*l.*, part of the residuary trust fund, upon similar trusts for her brother, William, and his children; a further sum of 2,000*l.*, part of the residuary trust fund, upon similar trusts for her nephew, Claude Parnell, and his children; a further sum of 1,000*l.*, part of the residuary trust fund, upon similar trusts for her sister and her children; and, as to the further sum of 700*l.* (not in this case described as part of the residuary trust fund) upon trusts for the widow of another nephew who had died, with remainder to her daughter absolutely. She then proceeded: "and as to all the "remainder of the residuary trust fund I direct that my said "trustees shall stand possessed thereof in trust for . . . . "Harry Duncan Nourse." The testatrix died on August 10, 1907, and her will was proved on October 10, 1907. Claude Parnell died a bachelor in 1941, with the result that the gift to his children failed to take effect. The trustees took out this summons, asking whether the 2,000*l.* settled on Claude Parnell and his children was undisposed of and passed to the next of kin of the testatrix, or whether it was included in the gift of the "remainder" and passed to the executor of H. D. Nourse, who was dead.

Horace Freeman for the plaintiffs.

Wilfrid Hunt for the next of kin. On the death of Claude Parnell without having had issue, the 2,000*l.* was undisposed of, and went to the testator's next of kin. It was a share of the residue, and it does not pass to a person entitled to another share of the residue. The rule applicable to such cases is stated in Hawkins on Wills, 3rd ed., at p. 53. It is always a question of the true construction of the words used: see *In re Parker* (1); *Skrymsher* v. *Northcote* (2); *Lloyd* v. *Lloyd* (3).

Jopling for the executor of H. D. Nourse. On the true construction of the will, the "remainder" of the residuary funds carries with it anything undisposed of. If one of these legatees had died before the testatrix his legacy must have fallen into residue, and been added to the remainder. The remainder is here the true residue, after payment thereout of the legacies. The decision in *Lloyd* v. *Lloyd* (3) simply follows *Skrymsher* v. *Northcote* (2), and the latter case is not now regarded as an authority: see Jarman on Wills, 7th ed, vol.. II, p. 1,018. The true principle to be followed was laid down by the Court of Appeal in *Blight* v. *Hartnoll* (4). A residuary bequest, however expressed, must be intended to comprise all that is not disposed of by the will. If there is any ambiguity the court will lean against any interpretation that would lead to an intestacy, even in part.

UTHWATT J. [after stating the facts]: The question is whether this sum of 2,000*l.* falls into, and is comprised in the gift of, "the remainder," or whether it is undisposed of. This class of question is very common. I accept the statement with regard to it in Hawkins on Wills, 3rd ed., p. 53, which is as follows: "If a part of a particular fund be given to one "person and the residue to another, it is a question of intention, not subject to any particular rule, whether the gift "of the residue is to be read as a gift of the mere balance of "the fund after deducting the amount of the sum previously "given out of it, as in the cases of *Page* v. *Leapingwell* (5) "and *Easum* v. *Appleford* (6): or a gift of the entire fund "subject to the gift previously made out of it, as in *Falkner* v. "*Butler* (7), *Carter* v. *Taggart* (8), and *Re Harries' Trust* (9): "In the latter case, if the gift or part fails, the gift of the residue "may carry the whole fund: in the former case, not so." This statement accords with common sense. The matter is to be treated purely as a question of the proper construction of the will under consideration and not as one calling for the application of a rule of law. The question here, therefore, is: Does the "remainder" mean the residuary trust fund less the various sums, or what remains of the residuary trust funds after giving effect to the gift of those various sums?

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(1) [1901] 1 Ch. 408.
(2) (1818) 1 Swanst. 566.
(3) (1841) 4 Beav. 231.
(4) (1883) 23 Ch. D. 218.
(5) (1812) 18 Ves. 463.
(6) (1840) 5 My & Cr. 56.
(7) (1765) Ambl. 514.
(8) (1848) 16 Sim. 423.
(9) (1859) Johns. 199.

There is a further general observation to be made. If the words of the will are rationally capable of two constructions, and one of them results in an intestacy and the other does not, one should prefer the latter construction. Turning to the will, in the earlier part of it there is a direction to pay a number of legacies of small amounts. These legacies rank in priority to those directed to be paid out of the residuary trust fund, and the will, therefore, discloses a rational intention not requiring that the latter set of legacies should be treated as substantive parts of the residuary trust fund. Next, in the case of four of the second set of legacies the sum referred to is a sum of cash called "part of such residuary trust fund." It is not a proportionate share. It is not a specific part. In substance, these sums come "out of" the residuary trust fund. Thirdly, the sum of 700*l.* is not referred to as part of the residuary trust fund. The last point is that (leaving aside the legacy of 700*l.*) the nature of the trusts affecting the second set of legacies is such that it was possible from the first that there might be a failure owing to one of the tenants for life not having children. Claude, indeed, was a bachelor.

What is the fair way, having regard to these matters, to read this will? Should it be read as meaning that the testatrix set about dividing the residuary estate into different parts, one of which she called "remainder," or as meaning that the remainder was the whole subject to the subtraction of certain funds so far as might be required for certain specified purposes? In my opinion, the latter way is correct. Holding that view, I find that the sum in question passed under the final gift to H. D. Nourse and is now payable to his executor.

Solicitors: *Kingsford, Dorman & Co.; Leman, Chapman & Harrison.*

H. L. L.

In re BIRD, Deceased.

HENN *v.* BIRCH.

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Oct. 21; *Nov.* 24.

Administration—Will—Payment of " stated amount free of income tax "—Difference between income of trust fund and a fixed sum—Finance Act, 1941 (4 *&* 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1.

A testator, by his will, created a trust fund, and directed the trustees to pay the income thereof to his wife during her widowhood, and if in any year the income of the fund, after deduction of income tax, should not reach 500*l.*, the trustees were to make up the deficiency to her out of capital. The testator died in 1933 and in every year from his death until 1942, when his widow died, the income of the trust fund fell short of 500*l*:—

Held, that the provision in the will was a " provision . . . . " for the payment . . . . of a stated amount free of income tax," within s. 25, sub-s. 1, of the Finance Act, 1941, the " stated amount " being the amount by which the income of the trust fund fell short of 500*l*:—

Held, also, that the trustees should have paid to the widow in each year such a sum as (after deduction of tax) would together with the income of the trust fund (after deduction of tax) make a total of 500*l.*

ADJOURNED SUMMONS.

By cl. 8 of his will, made in January, 1932, the testator, Thomas Frederick Bird, after providing for the creation of a trust fund, made the following provision: " My trustees " shall pay the income of the trust fund to my said wife during " her widowhood and after her remarriage shall pay the " income of one-half of the trust fund to her during the " remainder of her life without power of anticipation during " coverture. And I direct that if in any year the income received " by my said wife from the trust fund during her widowhood " shall amount after deduction at the source of income tax at " the current rate for the time being therefrom to less than " 500l., then my trustees shall resort to the capital of the trust " fund and shall thereout make good to my said wife the " amount of the deficiency." The testator died on December 5, 1932, and his will was duly proved. In all the years between the death of the testator and the death of his widow on January 19, 1943, the income of the trust fund, after deduction of income tax therefrom, was less than 500*l.*, and in each such year the trustees raised and paid to her the amount of the deficiency without deduction of tax. By this summons the plaintiffs, the trustees of the will, asked (1.) whether, on the true construction of the will, the trustees ought to have paid to the widow out

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of the capital of the trust fund (*a*) such a sum as, after deduction of income tax, would, together with the net income of the trust fund (after deduction of tax) received by her, make up a total sum of 500*l*., or (*b*) such a sum (subject to deduction of income tax) as represented the difference between the net income of the trust fund and 500*l*., or (*c*) some other, and what, sum; (2.) whether, in the years during the lifetime of the testator's widow in which the standard rate of income tax was 10*s*. in the pound, s. 25, sub-s. 1, of the Finance Act, 1941, (1) applied to the direction in cl. 8 of the will, and, if it did so apply, whether "the stated amount" free of income tax for the purpose of that section was the deficiency of income below 500*l*. or some other, and what, sum.

UTHWATT J. held that the answer to the first question was the alternative stated under (*a*).

Hillaby for the plaintiffs.

Geoffrey Cross for the executors of the widow. There is no provision for the payment of any stated sum. The amount by which the income less tax falls below 500*l*. varies with each year, so cannot be predicted in advance and so cannot be a "stated" sum: *In re Hawkins* (2). The present case comes under the first provision in that case.

Raymond Jennings for the residuary legatee. This is a provision for the payment of a "stated amount" free of income tax; once the income is ascertained, the amount by which it falls short of 500*l*. is also ascertained, and it then becomes a "stated amount." A "stated amount" within s. 25, sub-s. 1, need not be a predictable amount. The case comes under the decision on the second provision in *In re Hawkins* (2).

Cur. adv. vult.

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(1) By Finance Act, 1941, s. 25, sub-s. 1 . . . . "Any provision, "however worded, for the payment, whether periodically or "otherwise, of a stated amount free "of income tax, or free of income "tax other than surtax, being "a provision which—(*a*) is contained in any deed or instrument, in any will or codicil ". . . . and (*b*) was made before "September 3, 1939, and (*c*) has "not been varied on or after that "date, shall, as respects payments falling to be made during "any year of assessment, the "standard rate of income tax for "which is ten shillings in the "pound, have effect as if for the "stated amount there were substituted an amount equal to "twenty-twenty-ninths thereof."

(2) [1943] 1 Ch. 67

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Nov. 24. UTHWATT J. read a judgment, in which, after stating the provision in cl. 8, he proceeded: The question now to be determined is whether that provision is a "provision "however worded, for the payment of a stated amount free "of income tax" within the meaning of s. 25, sub-s. 1, of the Finance Act, 1941. It is not disputed, and could not, I think, be disputed, that an amount to be ascertained by carrying out mathematical operations where none of the factors can vary is a "stated amount." It is, however, argued that, where (as is the case here with the return from the trust income) one of the factors may vary in amount from time to time with the result that the amount payable from time to time under the provision is unpredictable, no amount is "stated," and that the provision is more properly described as a provision for the payment of an unstated amount than as a provision for the payment of a stated amount.

In my opinion, this argument gives too narrow a meaning to the phrase "stated amount." "Stated amount" is not, I think, confined to an amount stated in terms of currency. An amount can, in my view, be stated by reference to the income from time to time of an identified trust fund. The amount in currency of that income from time to time cannot, save perhaps in exceptional cases, be set out or predicted, but the source of the income referred to—the aggregate of the property for the time being comprised in the trust fund—does not change, and the income referred to, though subject to fluctuation in amount, remains the same thing, namely, the income produced by that aggregate. It is the amount of that income, whatever it may be from time to time, that is stated. The statement is the statement of an amount. The statement is complete in itself and no future happenings can vary the amount so stated. Some small support for my conclusion is to be found from the terms of s. 27 of the Act, where specific income (a phrase which in its context obviously includes income from an identified trust fund) is assumed for certain purposes to be income of a stated amount. If I am right in the view I have expressed, it follows that the amount by which the income of a trust fund falls short of a fixed sum is also a stated amount for the purposes of the sub-section. In my opinion, therefore, the provision before me falls within s. 25 of the Finance Act, 1941.

The only reported authority bearing on the point under

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consideration is *In re Hawkins* (1). Farwell J. there had to consider, first, a direction by a testator to pay out of income rates, taxes, and outgoings, costs of repair and insurance in respect of his house, and, secondly, a bequest to the testator's wife, so long as she and any of his dogs and horses were alive, for the keep of his dogs and horses while living and not given away, of a certain amount in each year in respect of each such animal. The sum payable under the first provision was held not to be, and that payable under the second provision was held to be, a "stated amount." My decision in this case is consistent with Farwell J.'s decision on the second provision, and, indeed, falls well within it, for extraneous circumstances—for instance, conduct of the wife in disposing of animals—could affect the annual amount payable, while in the case before me no extraneous circumstance can affect the income of the trust fund in the sense in which I have defined it above. As regards the decision on the first provision, I agree with the result at which Farwell J. arrived, but I rest my agreement on the broad ground that the bequest, though necessarily satisfied in money, was in substance a provision for the discharge of certain obligations and that it was no part of the object of the provision to state an amount or to arrive at an amount as an end in itself. Such a provision can hardly be "a provision however worded "for the payment of a stated amount."

Solicitors: *Stafford Clark & Co., for Hawkins & Co., Dudley; Jaques & Co. for Edwin Jaques & Sons, Birmingham.*

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(1) [1943] Ch. 67.

H. L. L.

Not followed. REX *v.* NORTHUMBERLAND COMPENSATION APPEAL TRIBUNAL, *Ex parte* SHAW [1951] 1 K. B. 711

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Dec. 9, 10, 20

RACECOURSE BETTING CONTROL BOARD *v.* SECRETARY FOR AIR.

Emergency legislation—Acquisition of land—Compensation—General Claims Tribunal—Arbitration—Power to set aside decision—Compensation (Defence) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 75), *s.* 7.

The General Claims Tribunal constituted under the Compensation (Defence) Act, 1939, is not an arbitral tribunal to which the Arbitration Acts, 1889 and 1934, apply, but is a special tribunal for which the Act of 1939 provides a comprehensive and exclusive code. The High Court, therefore, has no jurisdiction to entertain a motion to set aside a decision of the tribunal for error

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in law on the face of it, nor to review its decisions on matters within its jurisdiction, save by the statement of a consultative case under s. 7 of the Act of 1939.

Decision of Uthwatt J. [1943] Ch. 198 reversed on the question of jurisdiction, but affirmed in the result.

APPEAL from Uthwatt J. (1).

The respondent, the Secretary for Air, in exercise of emergency powers as defined in s. 17 of the Compensation (Defence) Act, 1939, requisitioned racecourse totalisator buildings owned by the claimants, who claimed compensation under the Act at the rate of 6,602*l.* a year, based on profits made by them in connexion with the buildings. The respondent contended that the buildings had no value for betting purposes when he requisitioned them, and that 610*l.* a year would be fair compensation. The dispute was referred, in accordance with the Act and rules under it, to the General Claims Tribunal which rejected the claimants' contentions and awarded compensation at the rate of 610*l.* a year. The claimants having moved to set aside the award as being erroneous in law, Uthwatt J. held that there was jurisdiction to hear the motion, but dismissed it on the merits. The claimants appealed.

Sir Donald Somervell A.-G., Danckwerts, and H. L. Parker, for the respondent, took the objection that the court had no jurisdiction to hear the motion. Admittedly, if the decision of the General Claims Tribunal was a decision in an arbitration, it could be set aside if an error of law on the face of it was established : see *Russell on Arbitration*, 13th ed., p. 190, and *Hodgkinson* v. *Fernie* (2). The jurisdiction of the High Court to review arbitrations is inherent ; *British Westinghouse Electric & Manufacturing Co., Ld.* v. *Underground Electric Railways Co. of London, Ld.* (3), followed in *F. R. Absalom Ld.* v. *Great Western (London) Garden Village Society, Ld.* (4). But proceedings before the tribunal are not arbitration proceedings. Section 7 of the Act of 1939 does not use the word arbitration, and there are other provisions in the Act to assist the view contended for. Thus, under s. 8, sub-s. 3, a judge of the High Court is made a necessary member of the tribunal ; the tribunal has no power to state an award in the form of a special case as provided in s. 9, sub-s. 1 (*b*), of the

(1) [1943] Ch. 198.

(2) (1857) 3 C. B. (N. S.) 189.

(3) [1912] A. C. 673.

(4) [1933] A. C. 592.

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Arbitration Act, 1934; the decision of the tribunal is final; and s. 11, sub-s. 1, of the Arbitration Act, 1889, is inconsistent with s. 7 of the Act of 1939, although s. 11, sub-s. 2, is not. The provision in s. 7 that any dispute as to compensation is to be "referred" to the tribunal does not create an inference that the dispute is to be a matter for arbitration: see per Lord Esher in *Munday* v. *Norton* (1). Section 9 of the Act of 1939 deals with a number of procedural matters that in the case of an arbitration would be covered by the Arbitration Acts, 1889 and 1934. Looking at the Act of 1939 as a whole, it is clear that a special tribunal is constituted with a code leaving no gaps to be filled up by the Arbitration Acts. It is true that there are cases when a tribunal is constituted with a special code, and yet there is an express provision excluding the application of the Arbitration Acts, but the same result can follow without the express provision. [They also referred to *Rex* v. *Minister of Labour* (2); and *Bexley Local Board* v. *West Kent Sewerage Board* (3).] Uthwatt J. seems to have proceeded on the supposition that a tribunal must be either a court or an arbitrator, but that is not so. *In re Jones & Carter's Arbitration* (4) is distinguishable from the present case for an award under the Act then in question (The Agricultural Holdings Act, 1908) was specifically made an arbitration. *Law* v. *Garrett* (5) does not assist here, nor do *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society, Ld.* (6) nor *The Cap Blanco* (7).

Comyns Carr K.C. and *Grant K.C.* for the claimants. The decision of Uthwatt J. that he had jurisdiction to entertain the motion can be supported either on the ground that proceedings before the General Claims Tribunal are a statutory arbitration within s. 20 of the Arbitration Act, 1934, or on the ground of the court's inherent jurisdiction—of which the setting aside of an award is merely one example—to control all tribunals except superior courts of record and cases specially dealt with by statute. On the criminal side that jurisdiction is exercised by certiorari, mandamus, and prohibition. On the civil side it used to be exercised by the writ of error, which went to courts of record, and the writ of false

(1) [1892] 1 Q. B. 403, 404.
(2) [1924] 2 K. B. 210, 218.
(3) (1882) 9 Q. B. D. 518.
(4) [1922] 2 Ch. 599.
(5) (1878) 8 Ch. D. 26.
(6) [1903] 1 K. B. 249.
(7) [1913] P. 130.

judgment in the case of other tribunals: Co. Litt, 288 *b*. The writ of false judgment has fallen into disuse and we have been unable to trace its development into the motion to set aside, but it is clear that the court from early times exercised the power to deal with error on the face of the decision of an inferior tribunal, for, by 9 & 10 Will 3, c. 15, that power was expressly extended to other grounds. Originally, the award had to be made a rule of court before the motion to set aside could be entertained, but that was merely machinery. *Aubert* v. *Maze* (1) is not of much assistance because there an action had been referred and it might have been said that jurisdiction arose from the action. In *Kent* v. *Elstob* (2) the point was whether the arbitrator was confined to strict principles of law, or could make his own law. The jurisdiction of the court was not disputed. All arguments based on the provision by this special Act of its own code are beside the mark, for the Arbitration Acts themselves provide for the incorporation of their provisions in the code unless they are inconsistent with it: see *Attorney-General* v. *De Keyser's Royal Hotel* (3); *Tabernacle Permanent Building Society* v. *Knight* (4). The mere presence of a code is irrelevant. The question is whether its provisions are inconsistent with the Arbitration Acts: *In re Kent County Council and Sandgate Local Board* (5). When Parliament sets up a body of persons other than the court and entrusts them with judicial decisions, that is a statutory arbitration because there is nothing else for it to be. Arbitration is any method of settling justiciable disputes otherwise than by the courts of this country. In *In re Jones and Carter's Arbitration* (6) the court held, in a matter with a more elaborate code than this, that the court could deal, under its inherent jurisdiction, with anything left uncovered by the code. A compulsory arbitration, such as a tribunal appointed to assess compensation is a court—of an inferior kind, it may be, but nevertheless a court—and as such subject to the jurisdiction of the High Court.

Sir Donald Somervell A.-G. in reply. There is no authority for the proposition that the jurisdiction of the High Court to set aside an award is part of a general jurisdiction to control inferior tribunals, and it is contrary to principle. In

(1) (1801) 2 B. & P. 371.
(2) (1802) 3 East 18.
(3) [1920] A. C. 508.
(4) [1892] A. C. 298.
(5) [1895] 2 Q. B. 43.
(6) [1922] 2 Ch. 599.

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Hodgkinson v. *Fernie* (1) Williams J. said that the jurisdiction to set aside an award was a rather regrettable exception to the rule that an arbitrator's decision was final, and there is no ground for extending it beyond the awards of arbitrators. It is submitted that the true principle is as stated by Williams J., and is the direct opposite of that submitted on behalf of the claimants. To hold that this motion lies would lead to most inconvenient results, for this Act applies to Scotland where the law as to arbitration is different from that of England : see *Adams* v. *Great North of Scotland Railway* (2) ; Encyclopædia of the Laws of Scotland, vol. 1, p. 470. The English and Scottish judges have deliberately sat together from time to time to establish uniformity in the administration of the Act in both countries, and it would be lamentable if divergencies arose through differences of law and practice on appeal.

[The court did not desire argument on the merits.]

Cur. adv. vult.

Dec. 20. The following judgments were read :

Lord Greene M.R. This is an appeal from an order of Uthwatt J. dismissing an originating motion whereby the claimants sought to have set aside a decision of the General Claims Tribunal established under the Compensation (Defence) Act, 1939, on the ground of alleged error of law on its face. It was objected below on behalf of the respondent that the court had no jurisdiction to entertain the motion. This objection was overruled by Uthwatt J., who, however, dismissed the motion on its merits. The same objection to the jurisdiction was taken before us, and at the conclusion of the argument on it we unanimously came to the conclusion that it was a valid objection, and that, accordingly, we were not entitled to entertain the appeal on its merits. In view of the general importance of the question thus raised, we thought it desirable to give our reasons in writing.

The decision which the claimants ask to have set aside was made on their application to have determined the amount of compensation payable in respect of buildings belonging to them, possession of which had been taken by the respondent on behalf of the Crown under the relevant emergency powers. The Compensation (Defence) Act, 1939, under which the application was made, lays down certain rules for fixing the compensation to be paid by the Crown where possession has been taken on its behalf under emergency powers. Section 7 of the Act sets up a tribunal called the General Claims Tribunal to which is entrusted the task of fixing the amount of compensation to be paid in case of dispute. But its decision in the present case, dated September 28, 1942, the tribunal set out three contentions stated to have been advanced before it on behalf of the claimants and rejected all three. It then proceeded to award compensation at the rate of 610*l*. per annum. It may be noted that the decision is described on its face as an "award" although the more proper description would have been "decision," which is the word used in s. 7 of the statute. The claimants were desirous of challenging the view taken by the tribunal on the three contentions in question.

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(1) 3 C. B. (N. S.) 189, 202.

(2) [1891] A. C. 31 ; 18 R. (H. L.) 1.

On the question of jurisdiction it was contended on their behalf (1.) that, whether the tribunal is to be regarded as an arbitral tribunal or as a court of inferior jurisdiction, the High Court has the power and the duty to set aside the decision on the ground of error of law on its face; (2.) alternatively, that the tribunal is an arbitral tribunal, and that the jurisdiction of the court to set aside awards of arbitrators on that ground is exercisable accordingly. On behalf of the respondent it was argued that the General Claims Tribunal is an ad hoc tribunal of a special kind, that the provisions of the Act which govern its powers and procedure are comprehensive, and that the only powers exercisable by the court are those specifically conferred on the court by the Act itself.

The first argument advanced on behalf of the claimants was of this nature. It was said that the jurisdiction to set aside the award of an arbitrator for error of law appearing on its face is one that exists at common law independently of the Arbitration Acts. It was also said that the jurisdiction is not confined to consensual arbitrations, but extends to arbitrations under statutes. Both these propositions are unquestionably correct: see e.g., as to the former, *Hodgkinson* v. *Fernie* (1), and, as to the latter, *In re Jones and Carter's Arbitration* (2). The next and vital proposition is, however, one which, in my opinion, cannot be supported either on principle or on authority. It was that the jurisdiction is not confined to the case of awards of arbitrators, but extends to the decisions of every form of inferior tribunal, and, accordingly, when the legislature establishes a special tribunal, whether or not it

(1) 3 C. B. (N. S.) 189.

(2) [1922] 2 Ch. 599.

can be described as an arbitral tribunal, the court can set aside a decision given by it if an error of law appears on its face. This jurisdiction was said to exist quite independently of the old procedure by way of writ of error. No authority was quoted in support of this proposition, and, in my opinion, it is wrong in principle. In the case of an inferior court, if it acts beyond its jurisdiction, the remedy is by certiorari. If, acting within its jurisdiction, it makes an error in law, the remedy is by appeal (if the decision is appealable), and that whether or not the error appears on the face of the decision. In the case of new tribunals set up under statute no appeal will lie unless the right of appeal is conferred expressly or impliedly by statute, and, accordingly, where, as in the present case, no right of appeal is given, their decisions are not appealable. It does not, however, follow from this that there is some inherent jurisdiction in the court to set aside the decision of such a tribunal, not being an arbitral tribunal, for error of law on its face. I can find no trace of any exercise of this particular jurisdiction elsewhere than in the case of awards of arbitrators either consensual or statutory, and, in my opinion, it is confined to that case. Exactly how and why the jurisdiction came to be established in the case of arbitrations it is not pertinent to inquire. In *Hogge* v. *Burgess* (1), Martin B. says that the old rule that the decision of an arbitrator on both the law and the facts was conclusive was first broken into by the Court of King's Bench in *Kent* v. *Elstob* (2). *Kent* v. *Elstob* was a case where the error appeared on the face of a document delivered with the award and the language used both in the argument and in the judgments suggests that the jurisdiction was already recognized in cases where the error appeared on the face of the award itself, the real controversy being whether it existed where the error appeared in a separate document. However this may be, the jurisdiction is treated by Martin B. as an anomalous exception grafted on to the general rule relating to the conclusiveness of the awards of arbitrators. The same view had been expressed the year before by Williams J. in *Hodgkinson* v. *Fernie* (3), where that learned judge refers to it as an exception which, though it was to be regretted, was then, he thought, firmly established. On the other hand, this jurisdiction may be the last relic of a power which, it appears, the courts

(1) (1858) 3 H. & N. 293, 296.

(2) 3 East, 18.

(3) 3 C. B. (N. S.) 189, 202.

used to claim the right to exercise, namely, a power to review the awards of arbitrators both on law and on fact: see per Lord Halsbury L.C., *Adams* v. *Great North of Scotland Railway* (1).

The second argument is alternative to the first and depends on the proposition that the General Claims Tribunal is a statutory arbitral tribunal, and that its decision can, accordingly, be challenged on the ground of error of law on its face. It was to this argument alone that the reasoning of Uthwatt J. was addressed. He expressed the view that every tribunal must be either an arbitral tribunal or a court. He then examined the constitution and procedure of the General Claims Tribunal and held that it was not a court. Therefore, he said, it must be an arbitral tribunal. With all respect to the learned judge, his approach to the problem was, in my opinion, an erroneous one. It is competent to the legislature to set up any kind of tribunal that it pleases. The questions to be determined in any particular case are: What is the true nature of the tribunal which the legislature has established? and: What are the powers, if any, which have been conferred on the courts with regard to its decisions? These questions must be decided by a consideration of the statute and the true interpretation of its provisions.

That the legislature can and often does set up a tribunal which is arbitral in its nature is beyond dispute. It may make its intention clear by using the word "arbitration" or its intention may have to be collected from the language of the statute as a whole. If the statute does provide for arbitration, two consequences follow. First, s. 24 of the Arbitration Act, 1889, and s. 20 of the Arbitration Act, 1934, will, unless excluded, apply, and the provisions of those Acts, in so far as they are not inconsistent with the statute, will be imported into the statutory arbitration. Secondly, the inherent power of the court (which, as I have said, it possesses quite apart from anything in the Arbitration Acts) to set an award aside on the ground of error of law on its face will be exercisable in respect of the awards of the tribunal. This power is a feature of English law relating to arbitration and once the legislature has shown its intention to place a statutory tribunal in that category the power arises as a matter of course. The question, therefore, in the present case is: Has the legislature manifested an intention to place the General Claims Tribunal in the category of arbitral tribunals, or is the tribunal a special tribunal which falls outside that category and is governed exclusively by its own code? In my opinion, the former question must be answered in the negative and the latter in the affirmative. My reasons may be summarized as follows.

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(1) [1891] A. C. 31, 39.

Section 7 of the Compensation (Defence) Act, 1939, provides that the decisions of the tribunal are to be final. This by itself might scarcely be enough, but it is qualified by a proviso giving power to the tribunal to state and to the court to order a consultative case on a question of law. The collocation of the enactment as to finality with the qualification contained in the proviso shows, in my opinion, that final means final as regards both fact and law, and that the proviso is intended to state the only case in which the court is to have jurisdiction with regard to any matter of merits falling within the competence of the tribunal. I am not, of course, dealing with a case where the tribunal exceeds or threatens to exceed its jurisdiction. To such a case quite different considerations apply. It is to be noted further that the statute does not use the word "arbitration" or "arbitrators." This by itself would not be decisive, but, when taken in conjunction with other indications, it is, I think, important, particularly when s. 24 of the Arbitration Act, 1889, and s. 20 of the Arbitration Act, 1934, refer to arbitrations under statute and apply the provisions of the Acts, so far as not inconsistent, to such arbitrations. With these sections before it, the legislature would have been guilty of an unfortunate fault of draftsmanship in not using the word "arbitration" if its intention was that the provisions of these two sections should apply. I do not attach any weight to the word "referred" in s. 7. What, however, appears to me to place the matter beyond all doubt is the fact that the provisions of s. 7 are applicable both to England and to Scotland with the substitution of the Court of Session for the High Court in the case of Scotland. The Scottish law of arbitration differs in many important respects from the English law on the same subject: per Lord President Dunedin in *Municipal Council of Johannesburg* v. *D. Stewart & Co. (1902), Ld.* (1). The Arbitration Acts, 1889 and 1934, do not apply to Scotland. So far as I have been able to discover, the only recent statute relating to arbitration in Scotland is the Arbitration (Scotland) Act, 1894, which only deals with details of procedure. The Act of Regulations, 1695, is still in

(1) 1909 S. C. 860, 876.

force. It seems to me to be the height of improbability that the legislature, when setting up one tribunal for both countries, should have intended to do so in such a way as to import two widely different systems of law, one for Scotland and one for England. The fact that one set of statutory provisions is to do duty in both jurisdictions appears to me to afford the strongest support to the view that the statutory code is intended to be exhaustive, and that the powers of the High Court in England and the Court of Session in Scotland are to be those, and only those, which the statute in terms confers. But, quite apart from the general difference between the laws relating to arbitration in the two countries, which appears to me to be sufficient to establish the point, there is, if my understanding is correct, a particular difference which is of immediate relevance to the present case. I can only speak with the utmost diffidence on a matter of Scottish law, but I gather that in Scotland an arbitrator is still the final judge both of law and of fact and that there is no procedure in Scotland which corresponds in any way to the English rule that the court can set aside an award for an error of law appearing on its face: see s. 25 of the Act of Regulations, 1695; Bell's Dictionary and Digest of the Law of Scotland, 7th ed., p. 62, col. 1; Erskine's Principles of the Law of Scotland, 20th ed., p. 595. *Adams* v. *Great North of Scotland Ry.* (1). If I am right in this, the result on the claimants' argument would be that a claimant in England would be in a much more favourable position than a claimant in Scotland. Decisions of the tribunal could be challenged in England which, if given in Scotland, would be unchallengeable, a result which cannot have been intended by the legislature.

These considerations appear to me to be conclusive. There are other matters which confirm this view, if confirmation be needed. If a reference to the tribunal is a statutory arbitration, then in England (but not in Scotland) s. 24 of the Arbitration Act, 1889, and s. 20 of the Arbitration Act, 1934, will apply. A few examples of the consequences which would follow are sufficient to bring out the point. First, the proviso to s. 7 which gives power to state a consultative case would be unnecessary, since this power is given by s. 9, sub-s. 1 (*a*), of the Arbitration Act, 1934. There would also be imported the power to state an award in the form of a special case given by

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(1) [1891] A. C. 31, 44.

s. 9 (1) (*b*). The fact that the legislature has expressly provided for the former power and has said nothing about the latter shows, in my opinion, that it was not intended that the latter should exist. Similar observations as to redundancy apply to s. 9 of the Act. Secondly, the power to remove an arbitrator for misconduct under s. 11 of the Act of 1889 would apply. The fact that holders of high judicial office are to be members of the tribunal makes it unlikely, to say the least, that the legislature intended that they should be exposed to the possibility of proceedings being taken to remove them. In the result, the objection to the jurisdiction succeeds, and the appeal must be dismissed with costs.

MACKINNON L.J. The General Claims Tribunal, established under the Compensation (Defence) Act, 1939, gave their decision on the claim of the plaintiffs by a document dated September 28, 1942, signed by the president and three other members and bearing the title "award." The claimants, by notice of motion, dated November 3, 1942, moved before Uthwatt J. to set aside this "award" on the ground that there was "an error of law on the face of the said award." The Attorney-General, appearing for the respondent, took the objection that the court had no jurisdiction to entertain this motion inasmuch as the document impugned was not an award of arbitrators, and, therefore, was not subject to the rule that such an award can be set aside on such a ground. Uthwatt J. overruled this objection, heard the motion on its merits, and on that ground held that the motion failed. From his decision the claimants appeal. The Attorney-General before us renewed his objection to the competence of the motion, and asked for the dismissal of the appeal on that ground.

The proposition that an award of an arbitrator can be set aside for error of law appearing on the face of it is, I think, a rule peculiar to arbitration. Mr. Comyns Carr sought to argue that it is only a particular application of a general principle which he enunciated as being that a superior court will set aside the decision of an inferior tribunal if that decision contains on the face of it an error of law. I do not think there is any such general principle. Prima facie, if parties have contracted to refer a dispute to an arbitrator, they are bound by their contract, and the award of the arbitrator is final and binding. It is significant that if, by their contract, they have agreed to leave to him the decision of a question of law, they are bound by his decision and any attempt to set it aside, even on the ground of manifest error of law on his part, will fail. This suffices to show that there is no such general principle as is suggested. If, however, their contract does not expressly or by necessary inference refer questions of law as well as of fact to the arbitrator, then it may well be that there is an implied term in their contract that he shall decide the dispute by the proper application of the law involved, and, if it is apparent, on the face of his award, that he has failed to do so, either party may contend that, by the contract, he is not bound to submit to this award since he has not so agreed. This, I believe, is probably the origin of the rule about setting aside an award for error of law on the face of it, though I confess I have been unable to discover as a matter of history the origin of it. It is, however, the only exception to the rule that an award by an arbitrator is final and binding for all purposes, and Williams J., in his exposition of the matter in *Hodgkinson* v. *Fernie* (1), not only says it is the only exception, but adds that it is possibly an unfortunate one, though too well settled to be doubted.

The Act of 1939, in s. 7, says that the decision of the tribunal is to be final. If the claimants' motion can be entertained, that can only be on one ground, namely, that the members of the tribunal are, in the eye of the law, arbitrators, and that their decision, which they entitle "award," is an award of arbitrators and subject to this special rule as to an award of arbitrators. To this proposition Uthwatt J. acceded. As the tribunal was called a "tribunal" and was not called a court, and as it was clearly not a court of record, he came to the conclusion that proceedings before it must be treated as arbitrations and its members as arbitrators. I cannot agree to this. There is nothing to prevent the legislature creating a tribunal of a special kind, expressly declared not to be a court of record and expressly declared not to be subject to the incidents of arbitration. I think that in this Act the legislature has done this with sufficient clearness. In addition to the express words used in s. 7, I am particularly impressed by the fact that this tribunal is to have jurisdiction in Scotland as well as in England, and a Lord of Session is to be a member of it. It is most unlikely that Parliament should intend that a decision of the tribunal, possibly involving nice questions of Scots law, should be an arbitrators' award liable to be reviewed

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(1) 3 C. B. (N. S.) 189, 202.

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by the English King's Bench Division on an allegation that it contained error of law on the face of it.

Uthwatt J. seems to have been a good deal influenced by *Law* v. *Garrett* (1), *Austrian Lloyd* v. *Gresham Co.* (2), and *The Cap Blanco* (3). In each of those the contract of the parties provided for the decision of any dispute by a foreign court, in each one of the parties brought an action in breach of his agreement, and in each his action was stayed. It is, I think, rather unfortunate that the power and duty of the court to stay the action was said to be under s. 4 of the Arbitration Act, 1889. In truth, that power and duty arose under a wider general principle, namely, that the court makes people abide by their contracts, and, therefore, will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined. Section 4 of the Arbitration Act, 1889, only applies this principle to one type of such an agreement. The three cases cited really apply it to another type, and it would have been, I think, more logical to say, not that the plaintiff could be restrained under s. 4 of the Act, but that he could be restrained under the principle of which that section is a particular example. In any case, it is manifest that, where there is an agreement to resort to a foreign court and an action is started in breach of that, s. 4 can be the only part of the Arbitration Act, 1889, that can have any application. The various other provisions as to the powers and duties of the court, as to special cases, removing an arbitrator, enforcing an award, and all such details, can have no application to proceedings in a foreign court. Manifestly the special rule of the law as to arbitrations, that an award can be set aside for error of law on the face of it, cannot possibly apply to the judgment of a foreign court. For these reasons, I think that the judgment of Uthwatt J. dismissing the claimants' motion should be affirmed but for different reasons than those underlying his judgment.

Goddard L.J. I agree with both judgments that have been delivered and will only add a few observations on the contention of Mr. Comyns Carr, which, as I understand it, was that, whatever the nature of an inferior tribunal might be, the court could, and would, always examine its findings, and, if an error of law appeared on their face, would correct them. This, in my opinion, is much too wide a statement. The King's Bench always possessed the power to examine by writ of error the proceedings of inferior courts of record, and this power was later also exercised by the Common Pleas, but this related only to inferior courts exercising jurisdiction at common law. Common instances would be the Mayor's Court, London, the Liverpool Court of Passage, the Stannaries Court and the various local courts of record which exist in many cities and towns throughout the country. The King's Bench also issued a writ of false judgment in early days to courts not of record, the only one of importance being the ancient county court, which, again, exercised a common law jurisdiction. A precedent of such a writ will be found in Fitz-Herbert's Natura Brevium, but that writ became obsolete when litigants ceased to resort to that court as they did comparatively early in legal history on account of its limited jurisdiction and cumbersome procedure. This writ also lay apparently to a court baron which, unlike the court leet, was not of record, but writs of error never lay, for instance, to the spiritual courts or to the court of admiralty although they were regarded as inferior courts and their jurisdiction was rigorously controlled by the King's Bench which constantly issued prohibitions to them. They were not courts of common law.

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(1) 8 Ch. D. 26.

(2) [1903] 1 K. B. 249.

(3) [1913] P. 130.

When and how the courts at Westminster first began to examine awards and to set them aside for manifest error it is difficult to discover. They certainly did so in the 17th century, as appears from an anonymous case in 1698 (1), and it seems that the court of chancery would entertain bills to relieve against awards that contained apparent errors of law. In *Brown* v. *Brown* (2), the Lord Keeper, Sir Francis North, said that, where there appears a manifest error in the body of an award, then, in some cases (he did not say in what cases) there may be relief against it in chancery, but, where the error does not appear without unravelling of it, he thought it was not relievable. In *Kent* v. *Elstob* (3), the court evidently had no doubt about its powers to set aside an award for error on its face. This power of setting aside awards of arbitrators for error appearing on the face of an award was said by Lord Haldane in *British Westinghouse Co.* v. *Underground Electric Railways* (4), to be a well-established part of the law, but,

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(1) (1698) 1 Salk. 71.

(2) (1683) 1 Ver. 156.

(3) 3 East, 18.

(4) [1912] A. C. 673, 686.

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in my opinion, it is none the less an exception to the general rule, that not only is the arbitrator judge of law as well as of fact, but that where a tribunal acts within its jurisdiction the only remedy, if its decision be wrong is by appeal, and appeal only lies if given by statute. There are, however, many bodies having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially which are neither courts nor arbitrators. They are subject to the control of the King's Bench Division by means of the writs of prohibition and certiorari (1) so as to keep them within the scope of their jurisdiction, but their decisions, if within their jurisdiction, are not reviewable by the courts. This matter was elaborately discussed and decided by this court in *Rex* v. *Electricity Commissioners* (2), where many instances are given of the tribunals or bodies to which these writs may be addressed though they are not courts and no appeal lies from their decisions nor can they be otherwise reviewed. I have no doubt that both these writs would lie to the General Claims Tribunal if it exceeded its statutory powers, but this is no ground for saying that the court can review a decision given within its jurisdiction. I agree that the appeal should be dismissed on this gound.

Appeal dismissed, but decision below reversed on question of jurisdiction.

Solicitors for claimants: *Sharpe, Pritchard & Co.*
Solicitor for respondent: *Treasury Solicitor.*

(1) *Reporter's Note.* By the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 7, the prerogative writs of prohibition, certiorari, and mandamus are replaced by "orders" of prohibition, etc. The change was merely a simplification of procedure, and no question of principle or jurisdiction is affected.

(2) [1924] 1 K. B. 171.

J. W. H.

ed. ASSOCIATED LONDON PRO-
ES, LTD. v. WILLIAMS. [1948]
E.R. 442.

WESTMINSTER (DUKE OF) *v.* STORE PROPERTIES, LIMITED.

BENNETT J.

1943

Nov. 24;
Dec. 14.

Emergency legislation—War damage—Contribution—"Rent"—Licence to lessee to convert private house into offices—Annual sum payable under licence—"Rent reserved" for purpose of calculating proportion of rent to contributory value—War Damage Act, 1943 (6 & 7 *Geo.* 6, *c*, 21), *s.* 50.

By a lease granted in 1908 premises were demised to lessees for a term of ninety years, at a rent of 125*l.* a year, subject, inter alia, to a covenant by the lessees not to use the premises for any trade or business, but only as a private dwelling-house. In 1936 the lessor granted to assignees of the lease a licence to convert the house into office premises on a covenant by the assignees to pay the yearly rent of 50*l.* in addition to the rent reserved by the lease so long as the premises, so converted, were in use as office premises:—

Held, that the annual sum of 50*l.* payable under the licence was not "rent reserved" within the meaning of s. 50, sub-s. 3, of the War Damage Act, 1943, for the purpose of ascertaining the proportion appropriate to the tenancy of the war damage contribution payable by the lessees in respect of the property.

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By a lease, dated May 30, 1908, the plaintiff demised a house and ground, No. 11, Hobart Place, London, S.W., to Trollope & Colls, Ld., for a term of 90 years from September 29, 1906, at a rent of 125*l.* a year, subject to a covenant by the lessees not to use or permit to be used the premises for any trade or business, but to use the same as a private dwelling-house only. At the date of the licence next referred to the demised premises had become vested in the defendant company for the residue of the term. By a licence under seal dated November 12, 1936, made between the plaintiff and the defendants, the plaintiff, in consideration of the covenants as to the alteration of the premises and of the rent covenanted to be paid, granted to the defendants full licence and permission to use the premises for offices in connexion with the business carried on by Gordon Hotels, Ld., and in consideration of this licence the defendants covenanted with the plaintiff during such part of the residue of the term as the premises were used for offices to pay the yearly rent of 50*l.* in addition to the rent of 125*l.* reserved by the lease of 1908, to be charged on the premises and to be payable on the same days. The licence also provided that the proviso for re-entry and the covenant for quiet enjoyment should extend to the premises as altered under the licence.

The premises were duly converted and used as offices, and the defendants paid the 50*l.* extra rent payable under the licence. This summons was taken out by the plaintiff to determine whether the yearly " rent " or sum of 50*l.* was " rent reserved " within s. 50, sub-s. 3, of the War Damage Act, 1943 (1), for the purpose of ascertaining during the currency of the licence for each period in which the relevant date fell, the proportion appropriate to the tenancy of the war damage contribution payable by the defendants in respect of the property.

Eardley-Wilmot for the plaintiff. The payments of 50*l.* a year under the licence, though described in it as " rent," are not " rent reserved " within the meaning of the War Damage Act, 1943, ss. 45, 48, 50. A payment by way of increased rent subsequently to the demise is not rent unless it can be inferred from the agreement that the parties intended to surrender the existing lease and create a new one : *Hoby* v. *Roebuck* (2). It is simply a sum payable under a collateral agreement creating a rent charge on the premises. It could not be distrained for : *Donellan* v. *Read* (3) ; *Lambert* v. *Norris* (4). The parties intended to keep the lease on foot. The licence is not in any sense a lease, and does not " reserve " rent which cannot be reserved out of any incorporeal right or hereditament : *British Mutoscope & Biograph Co., Ld.* v. *Horner* (5). There is no definition of " rent " in the War Damage Act, 1943, and the word when used in it must be given its usual strict meaning.

(1) By War Damage Act, 1943, s. 50 : " (1.) The proportion [of " an instalment of war damage " contribution] appropriate, as at " any date, to a tenancy shall " . . . . be determined as follows : " (2.) There shall be ascertained " the period which at that date the " tenancy has still to run. (3.) " There shall also be ascertained " the proportion which the rent " reserved for the period in " which the relevant date falls, " or, if that period is other than " a year, the annual equivalent " thereof, bears—(*a*) where the " land comprised in the tenancy " is the contributory property in " question, to the contributory " value thereof . . . . (4.) The " proportion appropriate to the " tenancy is the percentage in " the Table set out at the end of " this section appearing opposite " the entry in the first column " which includes the period ascertained in accordance with " subsection (2) of this section, " under the heading which includes the proportion ascertained in accordance with subsection (3) of this section."

(2) (1816) 7 Taunt. 157.

(3) (1832) 3 B. & Ad. 899, 905.

(4) (1837) 2 M. & W. 333.

(5) [1901] 1 Ch. 671, 674, 675.

A. C. Nesbitt for the defendants. "Rent" may mean something more than rent in its technical sense, and, if the parties have agreed to treat a payment under a supplemental agreement as rent, then it is rent for the purposes of the War Damage Act, 1943. In Gilbert on Rents, 1758, p. 24, the author says: "But if a lease for years be made of an incorporeal "inheritance which lies only in grant, reserving rent, such "reservation is good to bind the lessee by way of contract": see also at p. 33. These emergency Acts are somewhat loosely drawn, and should be construed broadly and liberally. Section 50 of the Act uses the word "tenancy," not "lease," and "tenancy" is defined in the Oxford Dictionary as the holding of land by any title of ownership. Sub-section 8 of the section deals with the case where a rent other than a money rent is reserved, and refers to the "money value of the rent." For the purpose of calculating the contributory value, any bargain for the payment of an annual sum for the use of the land should be treated as reserving rent for the purposes of the Act.

Cur. adv. vult.

Dec. 14. BENNETT J. read the following judgment. The question which I have to determine is whether the annual sum of 50*l*. payable by the defendants to the plaintiff under the licence of November 12, 1936, is rent within the meaning of s. 50 of the War Damage Act, 1943. The point is a very short one and depends, I think, entirely on whether the word "rent" is used in s. 50 in its technical sense or is to be given some other, and, if so, what meaning.

The War Damage Act, 1943, contains an interpretation section, s. 123, but this assigns no meaning to the word "rent." I was not referred to any provisions in the Act which indicate that the word is used in any special sense, and, therefore, I see no ground on which I can properly base a decision that the word "rent" is to have attributed to it a meaning other than its technical meaning. It is clear, I think, that the annual sum payable under the licence is not rent in the technical meaning of that term. A money rent is a sum reserved by a lessor on the occasion of a demise of land: see *Donellan* v. *Read* (1). The licence of November 12, 1936, does not purport to create a new demise in consideration of an additional rent of 50*l*. a year. The terms of the licence are inconsistent with

(1) 3 B. & Ad. 899.

the idea that the parties intended it to operate as a surrender of the premises comprised in the lease of May 30, 1908, and to create a new demise thereof. The fact that in the licence the annual sum of 50*l.* payable thereunder is spoken of as a rent is of no assistance to the defendants. I am not concerned with what the parties have chosen to call that payment. What I am concerned with is the nature of the payment, and whether it is rent within the meaning of the section in the Act of Parliament which I have to interpret. The truth is that the sum in question is not the consideration for the demise of the land comprised in the original lease, but is the consideration payable under a collateral agreement to enable the tenant to do on the land then vested in him an act which otherwise he could not lawfully do.

The language of s. 50 seems to me to confirm the view I have formed—that the word "rent" is used in the section in its technical sense, because in the three places in the section in which the word is used, namely, sub-ss. 3, 7 and 8, it is used in connexton with the word "reserved." This connexion indicates to my mind that the rent to which the section refers is something which arises on the occasion of a demise and is the subject of a reservation out of the subject of a demise. A sum payable to a landlord by a tenant by virtue of a collateral agreement containing no demise cannot, I think, properly be referred to as a rent reserved.

For these reasons I propose to make a declaration in the following terms: "That on the true construction of the said "licence and the War Damage Act, 1943, the yearly sum of "50*l.* (in the said licence referred to as 'yearly rent') payable "under the said licence in respect of the licence thereby "granted is not rent reserved for the period in which the "relevant date falls within the meaning of the said Act for "the purpose of ascertaining for each such period during the "currency of the said licence the proportion which such rent "bears to the contributory value of the premises demised by "the said lease."

Solicitors: *Boodle, Hatfield & Co.; Markby, Stewart & Wadesons.*

H. L. L.

SIMONDS
J.

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Oct. 29.

In re EUMORFOPOULOS, DECEASED.

RALLI *v.* EUMORFOPOULOS.

Will—Construction—Widow's right to select from contents of house " up " to the value of 10,000*l. taken at the probate valuation "—Valuation in affidavit leading to probate—Subsequent sale at prices greater than valuation—" Probate valuation "—" Contents of my house."*

By his will, a testator, who died in December, 1939, possessing a collection of works of art, plate and other valuable articles, bequeathed to his wife such of the contents of his house as she might select up to the value of 10,000*l.*, " taken at the probate " valuation." The contents of the house were valued as at the testator's death for the purposes of the affidavit leading to probate at 9,783*l.*, and the widow selected the whole of them. Later, an application was made to the revenue authorities, under s. 40 of the Finance Act, 1930, for exemption of part of the contents from estate duty, on the ground that they were of national, historic, or artistic interest, and exemption was granted as to works of art and other articles valued at 6,258*l.* In June and July, 1940, the widow sold the bulk of the contents, and, after deduction of expenses, they realized more than 20,000*l.* in excess of the valuation made for probate. The revenue authorities claimed estate duty on the proceeds, and by agreement duty was paid on the value of the net proceeds, less 33⅓ per cent. The residuary legatees claimed that the widow was only entitled to select articles to the value of 10,000*l.*, as realized at the sale :—

Held, that " probate valuation " meant the valuation made by valuers for the purpose of obtaining a grant of probate, and, therefore, the widow's claim to retain all articles, whether exempted from duty or not, selected by her, succeeded :—

Held, further, that " contents of my house " included articles normally kept in the house, but temporarily sent abroad for exhibition or placed in the country for reasons of security during the war, but did not include articles normally kept at the testator's bank and occasionally brought to the house for exhibition.

ADJOURNED SUMMONS.

By his will, dated April 12, 1938, the testator, George Eumorfopoulos, bequeathed to his wife, free of duty, first, all his watches, trinkets, personal ornaments and wearing apparel, and, secondly, " such of the contents of my house, No. 7 Chelsea " Embankment in the county of London " (other than certain excepted articles) " as my wife shall select up to the value of " 10,000*l.* taken at the probate valuation." At the date of his death on December 19, 1939, the testator possessed a valuable collection of works of art. The bulk of his collection was included in the actual contents of his house on that date, but part of it had been sent into the country for safe custody during the war. Part of his collection was normally kept at his bank, and certain valuables had been sent to America for exhibition there. After the testator's death, his executors made the usual affidavit leading to probate, and this included a valuation, made by Messrs. Sotheby & Co., of New Bond Street, London, of (*a*) all the contents of the house, whether dutiable or "while enjoyed in kind" exempted from duty under s. 40 of the Finance Act, 1930, as being of national, historic or artistic interest, (*b*) certain articles temporarily stored in the country for safety, and (*c*) other articles deposited for safe custody at the testator's bank. The amounts of these valuations were (*a*) 6,258*l*., (*b*) 2,975*l*., and (*c*) 550*l*., making a total of 9,783*l*. After probate had been granted an application was successfully made that certain articles included in this valuation at values amounting to 6,228*l*. should be exempt from death duties until sale under s. 40 of the Act of 1930. The contents having been valued for probate at under 10,000*l*., the widow selected the whole in exercise of the right given to her by the will. At a later date the widow decided that she would sell by auction the articles exempted from duty together with others not so exempted, and the sales took place in June and July, 1940. The articles of national, historic or artistic interest, valued for probate at 6,258*l*., less articles valued at 1,307*l*. but not sold, realized 28,580*l*. Articles not exempt from death duties which had been valued at 3,554*l*. were sold for 8,103*l*. The inland revenue authorities then made a claim for further duty. On behalf of the executors it was represented that between the date of the testator's death in December, 1939, and the date of the sales, in July, 1940, there was a great rise in the value of works of art owing to a general fear of inflation, and a desire to invest in tangible assets which would not be affected by inflation. The revenue authorities agreed, by way of compromise with the executors, to accept the value for duty purposes of the unexempted articles at the sale price less 33⅓ per cent. The plaintiffs, trustees of the will, took out this summons which asked whether the expression "probate valuation" in cl. 3 of the will meant as regards (*a*) articles bequeathed to the testator's widow which were exempt from estate duty while in her possession under s. 40 of the Finance Act, 1930, and (*b*) as regards articles not so exempt, (I.) the valuation made for the purposes of probate, or (2.) the amount for which they were subsequently sold and on which duty was levied.

H. H. King for the plaintiffs.

Wynn Parry K.C. and *Geoffrey Cross* for the widow. The testator laid down in his will a formula to bind all his beneficiaries. His widow was to have whatever she chose to select from the contents of the house up to the value of 10,000*l.* taken at the probate valuation. The valuation for probate of the contents was less than 10,000*l.*, and so she was entitled to take the whole of the contents. The fact that, owing to exceptional circumstances, there was a great rise in the value of works of art and the proceeds of the sale were greater than the amount of the probate valuation makes no difference to the widow's rights.

Gray K.C. and *Danckwerts* for the residuary legatee. "Probate valuation" does not mean Messrs. Sotheby's valuation which was challenged as being much below the real value. It means the true value on which duty was assessed and levied. The true valuation as regards articles sold was the sale price actually realized, less 33⅓ per cent., and less the costs of sale. Whether the articles were exempted from duty until sale under s. 40 of the Finance Act, 1930, or were not so exempted, "probate valuation" means the same thing in each case, and the same rule must be applied.

Parry K.C. replied.

SIMONDS J. It is claimed on behalf of the widow that she has exercised her right to choose 10,000*l.* worth of the contents of the testator's house, the value being taken at the probate valuation. It is claimed, on the other hand, by counsel representing the residuary estate that "probate valuation" in this will means the value which must be ascribed to the property passing on the death according to the rate of duty which is ultimately exacted by the revenue authorities. That means, with regard to the unexempted articles, the value that was agreed as a compromise, subject, I think, to some further concession regarding the deduction of expenses, and, with regard to the exempted articles, a value which must at some time be ascertained by analogy to the value accepted by way of compromise with the revenue authorities in regard to the unexempted articles, that is to say, the sale price less 33⅓ per cent.

One thing, at least, is agreed by counsel on both sides, namely, that it is impossible to ascribe to the testator the intention that a different method of valuing the articles forming the contents of his house should be adopted according as a claim for exemption under s. 40 of the Finance Act, 1930, was or was not made, that is to say, he used the words " value " . . . . taken at the probate valuation " as meaning the same thing whether applied to exempted or unexempted articles. I will, therefore, examine the contentions by reference, first, to the exempted articles which formed the larger part of the contents.

What did the testator mean by the expression " value " . . . . taken at the probate valuation " with reference to articles which I will assume he was aware might be exempt from duty? Clearly, no value is ascribed by the revenue to articles which are exempted from duty, because that duty is exigible, not on any principal value ascertained in any arbitrary or conventional way, but, under the specific terms of s. 40 of the Act of 1930, by reference to the proceeds of sale. Although, however, it is true that there is no valuation of such articles by the revenue for the purpose of exacting duty, yet there is a valuation for the purpose of probate which includes these articles as well as other articles. I find it impossible to believe that, with regard to those articles, when the testator used the words " value . . . . taken at the probate valuation " he meant anything but the valuation which is included in the affidavit leading to probate. He cannot have meant anything else, for there is no other valuation which can be called a probate valuation. It is inconceivable that, in giving to the widow a choice of contents up to the value of 10,000*l.*, he could have meant contents to the value of 10,000*l.* to be ascertained a year, or five years, or fifteen years later, when the contents were sold and estate duty was exacted. Therefore, with regard to exempted articles, I can come to no other conclusion than that the test is: What was the valuation ascribed to such articles in the affidavit which led to probate, and which in familiar language is referred to as the " probate " valuation "?

If the testator meant that with regard to exempted articles, I find it impossible to believe that he meant anything else in regard to unexempted articles. With regard to these articles I think I should come to exactly the same conclusion even if I did not have the assistance of the conjunction of unexempted and exempted articles, for there, too, it appears to me that what the testator was doing was to provide a convenient method, as between the several recipients of his bounty, of deciding how the benefit given to his widow should be measured. He was entitled to assume that a fair and proper valuation would be made by competent valuers. It might be there would be a contest on that valuation or some particular items of it as between the executors and the revenue authorities for the purpose of duty, but, as a fair method of ascertaining the value as between the different beneficiaries under the will, it is reasonable to assume that the testator would take the measure of the probate valuation in the sense of the valuation made by the expert valuers. Therefore I must so answer the question that is put to me in the summons, both as to exempted and unexempted articles.

A further question arises whether certain classes of goods are included in the expression "contents of my house "No. 7 Chelsea Embankment."

The question is raised, first, with regard to a set of gold plate, which was kept by the testator at his bank except on special occasions when it was brought to his house and placed with the rest of his collection for exhibition purposes. There is nothing to show that this gold plate ever was part of the contents of the house, or that it was ever near the house except for the single purpose of exhibition which may have been often or seldom. In those circumstances, I should not be justified in saying that it was part of the contents of the house. The question is next raised with regard to articles which were usually kept at the testator's house, but, at the outbreak of war in September, 1939, were removed to the country for greater safety. Those articles, I think it is clear (and the view is supported by authority), must be regarded as part of the contents of the house. The question is raised also with regard to certain articles which at the testator's death were in America, whither they had been sent for exhibition. Those articles, again, fall into two categories. Some which were sent to America were normally in the testator's house, and one article, a gold dish, was usually kept at the bank. The articles which were normally part of the equipment of the house form part of the contents although they may have been

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temporarily sent to America for exhibition. The gold dish, which was not normally part of the contents but was kept at the bank, comes within my earlier decision with regard to the gold plate.

Solicitors: *Freshfields, Leese & Munns* for all parties.

H. L. L.

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Nov. 23; *Dec.* 15.

In re GROSVENOR.

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Administration—Survivorship—Presumption—Evidence of simultaneous death—Air raid—Testators and legatees killed in same shelter—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 184.

By the Law of Property Act, 1925, s. 184, "In all cases where "after the commencement of this Act, two or more persons have "died in circumstances rendering it uncertain which of them "survived the other or others, such deaths shall (subject to any "order of the court) for all purposes affecting the title to property "be presumed to have occurred in order of seniority; and "accordingly the younger shall be deemed to have survived the "elder":—

Held, (1.) that the section is not restricted in its application to cases of strict questions of title as when the order of death of joint tenants is uncertain, but that it applies to cases when the disposition or devolution of property depends on the order of death of two or more persons; (2.) that the section does not apply when the simultaneous death of the persons in question can be established, but is confined to cases where there is uncertainty as to the survivorship of two or more persons; and (3.) that the words "subject to any order of the court" in the section do not give to court power to depart from the presumption there laid down.

Per Lord Greene M.R. The words "subject to any order "of the court" may be intended to enable the court to make a subsequent order in the event of fresh evidence becoming available.

Per Luxmoore L.J. These words may be inserted to call attention to the fact that the presumption laid down by the section is not irrebutable, as was thought by Bennett J. in *In re Lindop* [1942] Ch. 377, and by Cohen J. in the present case.

Two brothers had made wills leaving property to each other and to two legatees. On September 14, 1940, the brothers and the legatees were all in a shelter in the basement of a house which was struck by a bomb in an air raid. The bomb penetrated through to the basement, and then exploded killing all four persons, their bodies being terribly mutilated :—

Held (reversing Cohen J.), by Lord Greene M.R. and Goddard L.J. (Luxmoore L.J. dissenting), that there was sufficient evidence to establish that all four persons died simultaneously, and that the section did not apply.

APPEAL from Cohen J.

Two brothers, Randolph L. Grosvenor and Edward Moberley Grosvenor (hereafter referred to respectively as the first testator and the second testator), were residing at 75 Oakley Street, Chelsea, and on September 14, 1940, they and their cook-housekeeper, Elizabeth Sarah Parke, and Mrs. Mabel Edith Price-Jones and her daughter were killed when No. 5 Upper Cheyne Row, of which Mrs. Price-Jones was the occupier, was demolished by a direct hit from a high explosive bomb dropped during an air raid. The two brothers' house was only a few yards from 5 Upper Cheyne Row, and they and Elizabeth Sarah Parke were in the habit of taking refuge during an air raid in a shelter protected by sandbags in the basement of 5 Upper Cheyne Row. The two brothers, Elizabeth Sarah Parke and Mrs. Price-Jones and her daughter were killed by the explosion of a bomb which penetrated right through the house, and, on exploding, completely demolished the premises. The bodies were all found in the debris, mutilated, but the bodies of the two brothers were identified by what was found on them. The three other bodies were unrecognizable, but were identified as female. Eventually, certificates of death were issued in the form in the case of each of the two brothers of " Dead body found September 15, " 1940, 5 Upper Cheyne Row," and in the case of Mrs. Price-Jones and Elizabeth Sarah Parke of : " Believed to have been " killed on September 14, 1940, at 5 Upper Cheyne Row in an " air raid."

The first testator was born on July 29, 1867 ; the second testator on July 10, 1874 ; Elizabeth Sarah Parke on July 16, 1870 ; and Mrs. Price-Jones on February 20, 1888. By his will, dated July 6, 1921, the first testator left his property " to be " divided among my brothers (surviving at the date of my " decease) . . . . The above after the following legacies " have been paid : 200*l.* to my executor whom I appoint " herewith as being Edward Moberley Grosvenor." After a number of other legacies, he gave " 10*l.* to each other domestic " servant if more than six months in my service." Elizabeth

Sarah Parke had been in his service for more than this time and was still in his service when they both died. By his will, dated January 6, 1938, the second testator, after appointing executors, gave certain real property, together with his shares of the contents to the first testator, and also gave a number of legacies, including the sum of 200*l.* to Mrs. Price-Jones, with a provision that, if his estate exceeded 15,000*l.* (as happened), the legacies mentioned were to be doubled. He gave the residue of his estate to be distributed as to one-third to the first testator, as to one-third to Rowena Hickman, and as to one-third to the Union Castle Widows and Orphans Fund Association.

On April 14, 1942, the plaintiff, as one of the administrators with the will annexed of the first testator and sole executor of the second testator, took out a summons asking (1.) whether in the events which had happened the deaths of the two brothers and of Mrs. Price-Jones and Sarah Elizabeth Parke ought, by virtue of s. 184 of the Law of Property Act, 1925, to be presumed to have happened in order of seniority; and (2.) if not, whether, in the absence of any evidence as to the actual survivorship of any of these four persons, all dispositions in favour of these persons respectively in the wills of the two brothers ought to be treated as having failed. Cohen J. held, in agreement with Bennett J., in *In re Lindop* (1), that the words " subject to any order of the court " in s. 184 of the Act, gave the court no discretion in the matter of heirship; that the section is wide enough to cover a case of devolution of property; and that s. 184 applied in the present case. The defendant, Robert Pershore Grosvenor, the only surviving brother of the two brothers, appealed.

Jopling for this defendant. The only meaning to be given to s. 184 of the Act of 1925 is that a certain order of death is to be presumed when there is no evidence to the contrary. The court can hold that s. 184 does not apply when there is such evidence that the order of death is not uncertain. The words " subject to any order of the court " are inserted to give the court that power. It is still open to the court to hold on the facts that the deaths were simultaneous, and that is the result of the evidence in this case. The presumption in s. 184 does not arise because the proper conclusion from the evidence is that the persons in the shelter in 5 Upper Cheyne

(1) [1942] Ch. 377.

Row were killed simultaneously. The court can follow the evidence to displace the statutory presumption. On the evidence a jury might properly hold the deaths to be simultaneous and that is all that is required. A judge sitting without a jury is in the same position. Before the Act of 1925 was passed a person claiming a beneficial gift had to prove survivorship. Lord Campbell in *Wing* v. *Angrave* (1) recognized that persons may die simultaneously and that it is a question of inference from the facts. Further, to arrive at the meaning of the section, regard must be had to the difficulty it set out to remove. An example was where joint tenants died in circumstances that made it impossible to ascertain the personal representative of the survivor. [He cited *In the goods of Alston* (2); *In re Lindop* (3).]

Pennycuick for residuary legatees under the will of the second testator. Cohen J.'s decision was right. It is not possible as a matter of principle to establish before the court that two persons died simultaneously. This matter can be approached scientifically. [Lord Greene M.R. The view that time is infinitely divisible is metaphysical and not scientific.] However that may be, it can never on this view be established that deaths are simultaneous. Moreover, it is always uncertain as a practical matter whether deaths are simultaneous. In the present case the evidence is entirely circumstantial and Cohen J. found on it that he was not satisfied that the deaths were simultaneous. That decision was correct.

Fawell for two pecuniary legatees. Section 184 of the Act does not contemplate the possibility of simultaneous death. Either it covers the case of simultaneous death or treats it as incapable of proof. On the latter view, it would not be open to the court to hold deaths to be simultaneous. It was said in *Wing* v. *Angrave* (1) that it was almost impossible to prove deaths were simultaneous. Even if the ending here was sufficient to enable a jury to hold that deaths were simultaneous, s. 184 still applies. The section contemplates the case when it is uncertain whether A survived B or B survived A, and that must include the case when their deaths were simultaneous. These defendants are not concerned whether the two brothers died simultaneously, but only with the deaths of the two

(1) (1860) 8 H. L. C. 183.
(2) [1892] P. 142.
(3) [1942] Ch. 377.

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legatees, and there is no evidence that they died at the same instant of time as the two brothers. There must be more than a mere probability.

Beebee for the plaintiff.

Jopling replied.

Cur adv. vult.

Dec. 15. The following judgments were read.

LORD GREENE M.R. This appeal raises a difficult and important question as to the meaning and effect of s. 184 of the Law of Property Act, 1925. That section was obviously intended to deal with circumstances which in the past had given rise to practical difficulties. I do not think that it was designed so much to provide a method of dealing with those difficulties which would produce a just result as to lay down a general rule for resolving them. It cannot be disputed that if the events in this case had taken place before the section came into effect the appellant's contention would have prevailed. It was (and, apart from cases where the section applies, still is) essential that a person claiming through a legatee named in the will of a deceased person must prove that the legatee survived the deceased, whether or not a condition of survivorship was expressly inserted in the will. Conversely, if a gift to one person was made conditional on another person predeceasing the testator, the first-named person must (apart from the section) prove that the second-named person predeceased the testator. It followed that where a legacy was given to A and, if he predeceased the testator, to B, and it was uncertain whether A or the testator died first, neither the representatives of A nor those of B could claim the legacy, the former because they could not show that A survived, the latter because he could not show that A predeceased, the testator. This proposition is established by the decision of the House of Lords in *Wing* v. *Angrave* (1). Another example of the difficulties which arose where there was uncertainty as to the order of death was the case of joint tenants.

In the present case it was argued (1.) that the section only applies to what was described as questions of title strictly so called (such as the case of joint tenants) as distinct from questions of an express or implied requirement of survivorship in a will; (2.) alternatively, that the section does not apply

(1) 8 H. L. C. 183.

to the case of simultaneous deaths, and that, on the evidence in the case, all the persons concerned ought to be held to have died simultaneously. The first of these arguments is, in my opinion, clearly inadmissible. I can find no justification for the suggested distinction. The presumption as to the order of death arises " for all purposes affecting the title to " property." These words are very wide, and, in my opinion, clearly cover the claim by or through a legatee or devisee to the subject-matter of the legacy or devise. I agree, moreover, with the view of Cohen J. that the presence of the word " surviving " in the will of the first testator makes no difference in this respect.

There is one point which I should mention before I deal with the second of the two arguments above stated. I agree with the views of Cohen J. and of Bennett J. in the earlier case of *In re Lindop* (1), that the bracketed words in the section " subject to any order of the court " do not give the court a discretion to depart from the presumption in cases where the section says that it is to arise. It was faintly argued before us that this view was wrong, but it appears to me to be unassailable. I doubt, however, whether the construction placed by Bennett J. on these words is correct. He interpreted them as referring to the case where the presumption is rebutted by evidence as to the order in which the parties in fact died. Grammatically this construction seems to me, as at present advised, very difficult if not impossible to support. The section says that the presumption is to arise where it is uncertain which person was the survivor, and the construction favoured by Bennett J., with the adherence of Cohen J., makes the section read in effect as follows : " Where two or " more persons have died in circumstances rendering it un- " certain which of them survived the other or others such " deaths shall, unless it is proved to the court that it was not " uncertain . . . . be presumed to have occurred in order of " seniority." I agree that it is difficult to find a sensible meaning for the words. I suggest, however, that they may refer to subsequent orders of the court in the event of fresh evidence becoming available. The question does not, however, arise on this appeal, and I must not be taken as expressing any concluded opinion as to the meaning of these words except that they do not confer a discretion on the court to depart from the presumption.

(1) [1942] Ch. 273.

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Lord Greene M.R.

I now come to the second argument. The first question that arises here is whether as a matter of law it is possible for two persons to die simultaneously. It was argued against the contention of the appellant that the possibility of simultaneous death is not recognized by the law on the ground that, as time is infinitely divisible, it must always be certain that one of two persons in fact died before the other, although it may be, and in most cases of what would popularly be described as simultaneous death it will necessarily be, impossible to prove which in fact died first. The statement that time is infinitely divisible was said to be a scientific fact. I should prefer to call it a metaphysical conception. No doubt, when a bevy of angels is performing saltatory exercises on the point of a needle it is always possible to find room for one more, but propositions of this character appear to me to be ill suited for adoption by the law of this country which proceeds on principles of practical common sense. I must, however, examine the state of judicial opinion on the subject. In *Wing* v. *Angrave* (1) the following dicta are to be found, and they are no more than dicta. Lord Campbell L.C. said (2) in reference to a suggestion that where it is doubtful which of two individuals died first there is a presumption of law that they died at the same point of time : " I will not say that this " is impossible, although time, like matter, is said to be " infinitely divisible, but such a presumption is not warranted " by decision, by dictum, or by analogy." Lord Cranworth (3) said that a certain rule of construction (not relied on before us) might have been contended to be applicable " if the fact had " been, and had been ascertained to be, that Mr. and " Mrs. Underwood both died at the same instant of time, if " that could be possible." Lord Wensleydale said (4) : " No " one can suppose that she really meant not to give the " property to Wing, if her husband and herself should happen " to die at the same moment. No one doubts, that, had she " thought of such a possibility at the time she made her will, " she would have provided for it by express words " ; and later he said (5) : " If the words were read in their ordinary sense, " there would be an intestacy in the possible event of the " contemporaneous death of the testatrix and her husband." Lastly, Lord Chelmsford said (6) : " If both of them had been

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(1) 8 H. L. C. 183.
(2) Ibid. 199.
(3) Ibid. 209.
(4) Ibid. 215.
(5) Ibid. 216.
(6) Ibid. 222.

"asked what should become of the property in the event of "their simultaneous death, or a total inability to establish "the survivorship of either, it may be taken for granted that "their answers would have been in favour of the appellant."

Wing v. *Angrave* (1) was a case in which the deceased persons had been swept overboard by a wave and it was held on the facts to be impossible to say which was the survivor. The possibility that they died simultaneously could not be entertained, for obvious reasons. In the same case sub nom. *Underwood* v. *Wing* (2), Lord Cranworth had said: "It "cannot be assumed to be proved, or probable, or possible, "that two human beings should cease to breathe at the same "moment of time, for that is hardly within the range of "imagination." If Lord Cranworth had foreseen the march of civilization and had been able to visualize the possibility of a high explosive bomb bursting in a basement and blowing a number of persons to pieces, I cannot help thinking that he would have used different language. In the year 1855 the sort of calamity in which two persons might lose their lives, such as fire or shipwreck, was in its nature such as to leave a reasonable probability that one survived the other, or, to put it in another way, such as to exclude the probability that they died simultaneously. We have progressed far since those days. To speak of the infinite divisibility of time in relation to a modern high explosive bomb bursting in a basement shelter among the persons taking refuge there appears to me, with all respect to those who think otherwise, to ignore the realities of the case. In *In re Lindop* (3), Bennett J. cited the observations of Lord Cranworth without, however, accepting the view that simultaneous death was a legal impossibility. He agreed that such a thing was "so highly improbable that "the evidence relied upon to prove it must be looked upon "closely and critically." I do not regard the improbability as being nowadays so strong as Bennett J. and Cohen J. (who followed his decision) appear to have thought. To complete the references I should add that Sir William Grant M.R., in *Mason* v. *Mason* (4), spoke of simultaneous deaths as being within the bounds of legal possibility. I find nothing in authority which compels me to take the contrary view.

During the course of the argument I suggested that the section on its true construction might cover the case of simultaneous deaths. On consideration, I do not think that this suggestion can be supported. The words "uncertain "which of them survived the other or others" appear to me to be applicable only to the case where the proper inference from the facts is that the persons in question died consecutively and this will not be the case if the court comes to the conclusion on the evidence that they died simultaneously. The legislature has not thought fit to lay down a presumption as to the order of death in such a case, but has left the existing law to take its course.

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(1) 8 H. L. C. 183.
(2) (1855) 4 De. G. M. & G. 633, 661.
(3) [1942] Ch. 377.
(4) (1816) 1 Mer. 308.

This brings me to a consideration of the manner in which the question of simultaneous deaths, regarded as a pure question of fact, ought to be approached. A person claiming the benefit of the presumption under the section can, as it seems to me, only succeed if the court is satisfied as to two things—one that the proper inference from the circumstances is that the deaths took place consecutively, the other that the circumstances leave the court in uncertainty as to which death took place first. Each of these matters is a question of fact to be decided in accordance with the usual method of dealing with questions of fact. If the evidence merely shows that two persons were swept overboard by a wave no court, I venture to think, would draw any inference except that they died one after the other. The possibility of simultaneous death in such a case is obviously so remote that it must be left out of account. Now let me suppose that a witness saw one of the two swimming in the sea and saw the other disappear below the water. On this evidence the court would surely hold that the former survived the latter, and would not take into account the possibility that the swimmer was seized with cramp and sank and that the other rose to the surface and survived him. In other words, the court would draw the more probable inference that the swimmer survived. Uncertainty as to the order of death would not arise since it would be found as a fact what the order was and the section would not apply.

How does the matter stand on the issue whether two persons died simultaneously or consecutively? I do not see why any different principle should apply. It is true that simultaneous deaths can only occur in special circumstances, but, if the weight of evidence points to the conclusion that the deaths were simultaneous, I do not see why it should be said that the court ought not to draw that conclusion because of the existence of a remote possibility that it would be incorrect.

In the present case, the only possibility suggested is that one or other of the persons concerned may have been struck and killed by the falling bomb a fraction of a second before it exploded. Anything is possible, but is it to be said that a scintilla of a possibility of this sort is to prevent the court from drawing the obvious inference as to what in fact happened? I do not think so. The question whether two persons died simultaneously or consecutively is just as much a question of fact as the question which of two persons who died consecutively died first, and both questions must be dealt with on the same principles. If two persons were to be executed by the blade of a single guillotine it is possible that one of them might die of fright the moment before the blade descended, but such a possibility ought not, in my opinion, to be taken into account.

I do not propose to examine the evidence in detail. In my opinion, the only proper inference to draw is that all the persons concerned died simultaneously. If this inference cannot be drawn in this case I cannot imagine any case in which it could be drawn. It must not, however, be taken that in every case in which two persons are killed by the same bomb the same inference ought to be drawn. Each case must depend on its own facts, and where, for example, two persons killed by blast were some distance away from one another the court might well decline to draw the inference, particularly if it had before it evidence as to the capricious nature of the effects of blast. If one was considerably nearer the point of explosion than the other, the proper inference might well be that the former died before the latter. Again, if the deaths were caused by shrapnel and not by blast, the possibility that both deaths were simultaneous might well be too remote to take into consideration. I should add that I pay no attention to the fact that no witness in the present case expresses the opinion that the deaths were simultaneous. Such evidence would, in my view, have been both useless and superfluous having regard to the facts which were proved. I would allow the appeal.

LUXMOORE L.J. Two questions fall to be determined on this appeal: (1.) What is the true construction of s. 184 of the Law of Property Act, 1925, and (2.) what is the proper inference to be drawn from such facts as have been proved in evidence in this case. I propose to deal, first, with the

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question of construction. I have had the privilege of reading and considering the judgment of Lord Greene M.R. I agree that the object of the section was to solve the difficulty caused in cases where the disposition or devolution of property depended on one person surviving or predeceasing another. In all these cases unless the claimant can prove affirmatively that the person on whose survivorship of or death before another his title depended in fact survived or predeceased that other his claim failed. If authority be needed for this statement of the law it will suffice to refer to the leading case of *Wing* v. *Angrave* (1), but there are many cases to the same effect to be found in the books. I also agree that the object of the section was not to provide a solution which would in all cases produce an equitable result, but was to cut the gordian knot and arrive at a solution which would usually bring about a result in accordance with the expectation that in the ordinary course of nature a younger person will survive an elder. The section only purports to deal with cases where the circumstances in which two or more persons have died render it uncertain which of them survived the other or others. It seems reasonably plain that the section has not and was not intended to have any application where the element of uncertainty is absent. That element may be absent because the evidence establishes beyond doubt that A survived B or vice versa, or that neither survived the other because both died at precisely the same moment of time if this be a fact capable of proof. For cases of uncertainty the section lays down a presumption of universal application. The section contains two phrases which are said to create difficulty in ascertaining what is its true meaning, viz., " subject to any order of the " court," and " for all purposes affecting the title to property." It was argued that the first phrase gives the court a discretion whether it will or will not apply the presumption, if, in its opinion, a more equitable result can be obtained by the non-application. I find myself in agreement with the Master of the Rolls and the judgment of Cohen J. in this case and of Bennett J. in *In re Lindop* (2) on this point. What, then, is the meaning to be put on these words ? Both Bennett J. and Cohen J. are of opinion that the words were inserted to call attention to the fact that the presumption laid down by the section is not irrebuttable. It is true that, if this be the meaning and object of the phrase, it is redundant because the

(1) 8 H. L. C. 183.

(2) [1942] Ch. 377.

opening words of the section show clearly that the presumption is only to apply to cases of uncertainty, but I am unable to find any other meaning for the phrase and there is no presumption against tautology even in an Act of Parliament. With all respect to the Master of the Rolls, the meaning adopted by Bennett J. and Cohen J. seems to me to be preferable to the suggestion that the phrase is intended to reserve to the court power to reconsider the case after it has once been decided if fresh evidence should become available. I, accordingly, agree with the views expressed by Bennett J. and Cohen J. on this point. With regard to the other phrase " for all purposes affecting the title to property," it was argued that it applied only to questions of devolution of legal title as in the case of a joint tenancy and had no application to benefits depending on survivorship conferred by a will or settlement. Like the Master of the Rolls, I can find no justification for any such distinction. The words are of the widest import and are apt to cover all such benefits as those to which I have referred.

In my judgment, the section is confined to cases where there is uncertainty as to the survivorship between two or more persons. In the case of two persons there are three possible positions to be considered : (i.) Did A survive B ; (ii.) Did B survive A ; or (iii.) Did both of them die at precisely the same moment of time ? If one of these alternatives can be answered in the affirmative, then the element of uncertainty disappears and the section has no application to that case, but if to each of those questions the correct answer be that it is impossible on the evidence to answer " Yea " or " Nay," then the uncertainty is established and the presumption laid down by the section must be applied. The most difficult of the three questions to answer is obviously the third, viz., did both A and B die at precisely the same time ? It is true that in the past judges of great eminence have commented on the great difficulty and even the improbability of proving that two persons should die at the same moment of time. Indeed, Lord Cranworth in *Underwood* v. *Wing* (1) said : " It cannot be " assumed to be proved or provable or possible that two " human beings should cease to breathe at the same moment " of time for that is hardly within the range of imagination." I might add that the difficulty of proof does not lessen as the number of beings to be considered increases. There are

(1) 4 De. G. M. & G. 633, 661.

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many dicta to the same effect. Some of them have been referred to by the Master of the Rolls and will be referred to in the judgment of my brother Goddard which I have also had the privilege of reading. I agree with them that there is no decision which goes so far as to lay it down in precise terms that such an event is legally incapable of proof.

Both Cohen J. in the present case and Bennett J. in *In re Lindop* (1), refused to hold as a matter of inference on the facts before them that it was certain that the deaths under consideration by them respectively occurred at the same moment of time. In *In re Lindop* (1), as in the present case, the deaths were occasioned by direct hits from bombs dropped by enemy action, and there appears to me to be no distinction for practical purposes between the available evidence in the two cases. What is the available evidence in the present case? In considering it, it is necessary to bear in mind the fact that time is infinitely divisible, but I do not think that this alone is decisive of the case. It may well be (and I have certainly seen reports in the Press to that effect) that in cases where small houses and shelters in which a number of people have been assembled have been demolished by direct hits by bombs, some of those people have been found alive in the debris though the rest have perished. The vagaries of bomb burst and bomb blast are notorious. The fact that one person is blown to pieces while another has one or more of his limbs torn off would not, I think, justify a finding of death at the same moment. In such a case I should have thought it not improbable that the latter, in fact, lived some time longer than the former. Personally, I should require the assistance and experience of a well-qualified expert on the effects of bomb blast and bomb burst and their result in actual cases before I should feel justified in coming to the definite conclusion that two or more persons died at precisely the same moment. In my judgment, the onus of proving affirmatively that both or all died at the same moment is still as heavy as it was in Lord Cranworth's time, and I should have felt it would be improper to interfere with the conclusion on this point arrived at by Cohen J. in the present case and Bennett J. in *In re Lindop* (1), even if I had come to a different conclusion myself, but I find myself in agreement with them. For these reasons, I am unable to agree with the conclusion arrived at by the Master of the Rolls and my brother Goddard. I would dismiss the appeal.

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(1) (1942) Ch. 377.

GODDARD L.J. The first question that arises on this appeal relates to the true construction of s. 184 of the Law of Property Act, 1925. In *Wing* v. *Angrave* (1), a case which for another reason has an important bearing on the present one, Lord Wensleydale laid down a canon of construction which is often quoted. He was dealing with a will, but his words are equally applicable to an Act of Parliament, and, adapting them to that context, what he said (2) was, "The "statute is to be read in the ordinary and grammatical sense "of the words, unless that is contrary to or inconsistent with "the declared intention of the legislature, to be extracted "from the whole Act, or unless it involves any absurdity; in "which case it may be modified, extended, or abridged, so "as to avoid such inconvenience, but no further." As s. 184 deals with a separate and distinct matter, it is unnecessary to consider any other part of the Act, but it is material to bear in mind another rule of construction which applies specially to Acts which effect changes or amendments in the law. It is that you must have regard to what was intended to be remedied as well as to the remedy provided. Now, the matter to be remedied was, in my opinion, the law laid down in the above case, that there was no presumption arising from age or sex as to survivorship among two or more persons. If title depended on one surviving another that fact had to be proved, and that it might be impossible to establish it did not entitle the court to presume, which really means to guess, either that the elder or the stronger survived the younger or weaker, or that they died at the same time. This rule applied in all cases, not only when the deaths were occasioned by one and the same cause. It applied where two persons in the same ship were swept off by the same wave and drowned, and also to the case instanced by one of their Lordships of a wife dying in this country after her husband had sailed on a ship which was never heard of again. In some cases no doubt it could be proved that one survived the other, if only for a very short space of time; in others it could not. Accordingly, this section was passed, and it does not seem to me that construing it according to the ordinary sense of the words used results in an inconsistency with the presumed intention of Parliament

(1) 8 H. L. C. 183. (2) Ibid 215.

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or an absurdity. It may be that a literal construction omits some case for which another construction would provide, but that is not, in my opinion, a good reason for modifying or extending the plain words of the section. It leaves that case where it was before the Act. It would have been easy to draft the section so as to make the presumption apply to the case of simultaneous deaths, but I do not think it has done so. That the courts have visualized the possibility of two persons dying at the same moment of time is, I think, beyond doubt. In *Mason* v. *Mason* (1), it was stated as a possibility by Sir William Grant, and in *Wing* v. *Angrave* (2), Lord Campbell L.C. would not say that it was impossible for two persons to die at the same moment of time. Lord Cranworth in *Underwood* v. *Wing* (3), a case arising out of the same disaster, did appear to think that it was impossible to visualize two persons dying at precisely the same moment, but it surely must be in each case a question of fact, and the science of destruction, both of life and property, has advanced, if that be the right word to use, a good deal since 1854. The presumption which is established by the section only operates if it is uncertain which of two or more persons survived the other or others. Accordingly it does not arise if it is certain that some did survive, or if it is certain that none survived the others.

The question, then, being one of fact, I should be loth to come to a different conclusion from that of the learned judge except for two main reasons—first, as the case was tried on affidavit evidence we have exactly the same materials and opportunities of forming an opinion as had the learned judge, and, secondly, I think that Cohen J. felt obliged to follow the view of Bennett J. in *In re Lindop* (4). The latter seems to me to have thought, founding himself mainly on Lord Cranworth's dictum, that it is impossible in law to hold that two persons died at the same moment of time, but I confess I cannot see why it is, though ordinarily it may be very difficult to prove. The learned judge refers to the infinite divisibility of time, but that is a metaphysical conception, and for my part I do not think metaphysics ought to have any bearing on questions of proof in a court of law. It is true that Lord Campbell made a passing reference to the same conception, but what he said was, " I will not say that this (i.e.

(1) 1 Mer. 308.
(2) 8 H. L. C. 183.
(3) 4 De. G. M. & G. 633.
(4) [1942] Ch. 377.

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" simultaneous death) is impossible, although time like matter " is said to be infinitely divisible." He did not say that it was.

If, then, there is no law which says that simultaneous death must be regarded as incapable of proof, we must consider the evidence in the particular case. I pause here to say that it is undoubted law that in civil proceedings a finding can, and may be, rested on the probabilities of the case. There is a well-known and classic passage to that effect in the opinion of Willes J. given to the House of Lords in *Cooper* v. *Slade* (1), where he spoke of " the elementary proposition that in civil " cases the preponderance of probability may constitute " sufficient ground for a verdict," citing Dyer C.J. in *Newis* v. *Lark* (2). Both these judgments were referred to recently by the Court of Criminal Appeal in *Rex* v. *Carr-Briant* (3). The evidence in the present case is that the bodies of five persons were found in the ruins of a house, 5 Upper Cheyne Row, and two of them were subsequently identified as those of the two brothers with whose estates we are concerned. They were in the habit of going to this house, which was adjacent to their own in Oakley Street, for shelter during the raids which were taking place in September, 1940, as there was a reinforced and sandbagged shelter room in the basement. On September 14 the raid started at about 6 p.m. and the house received a direct hit about 6.35. That all five people were then actually in the shelter room is so highly probable that, to my mind, it amounts to a certainty that they were. Any one familiar with Chelsea knows that Upper Cheyne Row consists of moderate sized houses, and a basement room there can be fairly described as small, or at least not large The site of the house is there to be seen. The bodies were so mutilated as to be unrecognizable, and identity had to be established by what was found on the bodies. In some of the five cases there was actual dismemberment. The bomb was a high explosive and penetrated to the basement. In these circumstances, that all five were killed at the same time seems to me to be a matter of certainty. I would go so far as to say that the probabilities are so overwhelming that to feel doubt on the matter is really to speculate on improbable possibilities. Even in a criminal case it is not every conceivable possibility that must be excluded before a jury can be satisfied of guilt beyond reasonable doubt. The emphasis is on reasonable. It

(1) (1858) 6 H. L. C. 746, 772.
(2) (1571) Plowd. 403.
(3) [1943] K.B. 607.

may be said that to decide this is all very well, as a matter of common sense, but the law requires something more. Provided there is evidence on which a fact can be found or from which an inference may be drawn, the law, I venture to say, does not require anything more. This is a question that might well have to come before a jury who are always directed to use their common sense, nor do I know what else they can use. With all respect to the learned judge, to consider such matters as that, though the fraction of time cannot be measured, the blast must tend to reach one point slightly before it reaches another, when one is dealing with an explosion in a small room, is to introduce metaphysical and not practical considerations. I think both Bennett J. in the case cited above and Cohen J. in the present case read the section in the same way that I do. If that construction is wrong and it ought to be read as applying the presumption to a case where the court finds that the deaths were simultaneous as well as to where it is left in doubt which of two or more persons died first, the judgment under appeal would stand, but on the construction that I have given to it I think it ought, on the evidence, to be found that the deaths were simultaneous, and in consequence the presumption afforded by the section does not arise. I agree with what my Lords have said with regard to the words "subject to any order of the court." I would, therefore, allow the appeal.

Appeal allowed.

Solicitors : *W. R. J. Hickman & Randall ; Parker, Garrett & Co. ; Edwin Coe & Calder Woods.*

H. C. G.

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Nov. 3, 4, 5, 9, 10, 11, 16, 17, 18, 19 ; *Dec.* 14, 20 ;
1944
Jan. 12.

KANSSEN *v.* RIALTO (WEST END), LIMITED AND OTHERS.

Company — Director — Defect in qualification — De facto directors — Purported appointment of director—Purported issue of shares—Bona fide purchaser for value—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 143 ; *Sch. I, table A, reg.* 88.

Damages—Liability of de facto directors—Recovery through company.

At the end of 1939, the plaintiff and C. became the first directors of a company, each becoming the registered holder of one share and only two shares having then been allotted. The articles incorporated, with modifications, table A in sch. I to the Companies Act, 1929, reg. 88 of which provided that the acts of directors should be valid, notwithstanding that it be afterwards discovered that there was a defect in their appointment or that they were disqualified. The company, C. and S. alleged that in February, 1940, a meeting took place at which S. was appointed a director. In April, 1940, C. and S. purported, as directors, to terminate the plaintiff's directorship. In 1941, the annual general meeting required by the articles, at which the plaintiff and C. would have vacated office as directors, was not held, so that since December 31, 1941, there had been no de jure directors. In March, 1942, C. and S. purported, as directors, to appoint as a director M., and, inter alia, to allot thirty-four shares to him. In April, 1942, S. transferred 17 shares to M. M. had no notice that S. and C. were not directors, and could not have discovered that they were not directors if he had made all the inquiries which the court might reasonably have expected him to make. In an action by the plaintiff for, inter alia, rectification of the share register by removing the names of any persons other than the plaintiff and C., M. contended that, as a bona fide purchaser for value dealing with C. and S., he could rely on s. 143 of the Companies Act, 1929 (which provides that the acts of a director shall be valid, notwithstanding any defect that may afterwards be discovered in his appointment or qualification) and on reg. 88.

The plaintiff also alleged that, by the issuing and allotting of the shares to M., C. and S. had wrongfully procured a breach of the statutory contract subsisting between the company and the plaintiff, and that, as a result of that wrongful act, the value of the plaintiff's share in the capital of the company had been seriously diminished, and he claimed that he was entitled to damages against them, in the event of the court deciding that M. was entitled to the shares :—

Held, that the section and the regulation protected persons dealing bona fide with de facto directors, but did not remove any difficulty that there might be in the appointment of those directors, and that, therefore, M. could not be held to be a director ; and that M. was entitled to the shares which had been allotted to him because, at the dates of allotment, he did not know of the defect in the qualification of C. and S. :—

Held, further, that the claim against C. and S. for damages failed, and that the damages (if any) which the plaintiff had suffered as a member of the company were recoverable only through the company.

WITNESS action.

On December 27, 1939, the company was incorporated as a private company with a nominal capital of 100*l*. divided into one hundred shares of 1*l*. each. Only two shares were allotted, one to each subscriber to the memorandum of association. The articles of association incorporated, with modifications, table A in the first schedule to the Companies Act, 1929. On or about December 28, 1939, the subscribers to the memorandum appointed the defendant, Cromie, and the plaintiff, Kanssen, the first directors of the company, and transferred to them their shares. The company, Cromie, and the defendant, Strelitz, alleged, and the plaintiff denied, that on February 1, 1940, a board meeting was held at which Strelitz was appointed a director. On April 9, 1940, Cromie and Strelitz purported, as directors, to terminate the appointment of the plaintiff as a director. On April 12, 1940, they purported, as directors, to allot a further seven shares to Cromie and one share to Strelitz. On or about September 6, 1941, the secretary of the company sent to the registrar of companies an annual return made up to December 18, 1940, and stating that ten shares had been issued, eight being held by Cromie, one by the plaintiff and one by Strelitz. In 1941, no annual general meeting was held as required by reg. 22 of table A as modified by the articles of the company, at which, had it been held, Cromie and the plaintiff would have vacated office as directors. Therefore, they vacated office on December 31, 1941, since when there had been no de jure directors. On or about March 30, 1942, Cromie and Strelitz purported, as directors, to appoint the defendant, Morris, a director and, of the ninety unissued shares of the company, to allot thirty-four to Morris, thirty-two to Strelitz, and twenty-four to Cromie. Morris believed Cromie and Strelitz to be directors. He knew that the plaintiff claimed to be a director and that he denied that Strelitz was one, but he accepted the assurance of Cromie and of MacKay (a member of the firm of solicitors then acting for the company) that the plaintiff was wrong. On March 30, 1942, the plaintiff began an action against the company for rectification of the register. On April 13, 1942, a board meeting recorded that Strelitz had agreed to transfer seventeen of his shares to Morris, and on the same date the plaintiff began an action against the company and Strelitz to restrain Strelitz from acing as a director. On April 20, 1942, a board meeting purported to pass the transfer which was recorded to have been agreed on April 13, 1942. On May 14, 1942, pursuant to leave given by the court on May 12, 1942, Cromie and Strelitz were added as defendants to the first action, and Morris was added as a defendant to both. On May 18, 1942, a board meeting was told by Cromie of the actions begun by the plaintiff. On May 19, 1942, the actions were consolidated. According to the register, the members of the company were the plaintiff, Cromie, Strelitz and Morris. In the consolidated action, the plaintiff claimed declarations that the only shares which had been validly issued or allotted were one to each subscriber to the memorandum, to which shares the plaintiff and Cromie were entitled, and that the only directors were the plaintiff and Cromie; rectification of the register by entering the names of the plaintiff and Cromie each as the registered holder of one share only and removing the names of any other persons; injunctions restraining the defendants from disposing of any more shares without the concurrence of the plaintiff and restraining Strelitz and Morris from acting as directors; and damages.

Raymond Jennings and *M. Albery* for the plaintiff. Morris cannot rely on s. 143 of the Companies Act (1), and reg. 88 of table A (2), for those are not open to him unless Cromie and Strelitz, as well as he, were acting bona fide. As the annual general meeting of 1941 had not been held, Cromie and Strelitz must have known, or, at any rate, must be taken to have known, that they were not directors, and, therefore, were not acting bona fide. Regulation 88, in terms, deals only with defects which are "afterwards discovered," and, as Cromie and Strelitz must be taken to have known that they were not directors when they dealt with Morris, the defect cannot have been "afterwards discovered." For s. 143 and reg. 88 to apply, there must be a radical defect which, at the material time, is unknown to all parties: *Channel Collieries Trust, Ld.* v. *Dover, St. Margaret's and Martin Mill Light Railway Co.* (3), *Dawson* v. *African Consolidated Land and Trading Co.* (4), *British Asbestos Co.* v. *Boyd* (5). The appointment of Morris as a director, and the allotment and transfer of shares to him,

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(1) By s. 143: "The acts of a "director or manager shall be "valid notwithstanding any defect "that may afterwards be dis-"covered in his appointment or "qualification."

(2) By reg. 88 of table A: "All acts done by any meeting of "the directors or of a committee "of directors, or by any person "acting as a director, shall, not-"withstanding that it be after-"wards discovered that there was "some defect in the appointment "of any such director or person "acting as aforesaid, or that they "or any of them were disqualified, "be as valid as if every such person "had been duly appointed and "was qualified to be a director."

(3) [1914] 2 Ch. 506, 512.

(4) [1898] 1 Ch. 6.

(5) [1903] 2 Ch. 439.

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were ineffective, and his name ought to be removed from the register.

Wynn Parry K.C. and *Richmount* for the company, Cromie and Strelitz, did not address the court on this point.

Christie K.C. and *Hillaby* for Morris. The observations of Lord Cozens-Hardy M.R. in *Channel Collieries Trust, Ld.* v. *Dover, St. Margaret's and Martin Mill Light Railway Co.* (1) are directly in favour of Morris who genuinely believed Cromie and Strelitz to be directors and had every reason so to believe. True, there had been no annual general meeting in 1941, but Cromie and Strelitz were de facto directors in 1942, and, having purported in 1940 to terminate the plaintiff's directorship, were the only persons who could act as directors at the date of the dealings with Morris. The acts of a de facto board of directors are as good as those of a de jure board in favour of an individual, be he a member of the company or not, who bona fide believes the directors to be genuine directors and to be acting in accordance with their powers: *Dawson* v. *African Consolidated Land and Trading Co.* (2). *British Asbestos Co.* v. *Boyd* (3). *Transport, Ld.* v. *Schonberg* (4). *The Briton Medical, General, and Life Association* v. *Jones* (5). The present case is governed by the rule in *Royal British Bank* v. *Turquand* (6) that (as it is stated in Buckley on the Companies Acts, 11th ed., at p. 305): "a stranger dealing with a company has a right "to assume, as against the company, that all matters of "internal management have been duly complied with." Thus, it makes no difference if Cromie and Strelitz knew, or must be taken to have known, that they were not directors at the material times. Morris bona fide believed that they were. Therefore, his appointment as a director and the allotment and transfer of shares to him should stand.

Raymond Jennings in reply. In all cases where the section and the regulation, or provisions like them, have been held to apply, there have been defects which were unknown to all parties at the material times. Regulation 88 can apply only where there has been a technical slip, not where there is a radical defect, as here. The bona fides, not only of the person

(1) [1914] 2 Ch. 506, 512.
(2) [1898] 1 Ch. 6.
(3) [1903] 2 Ch. 439.
(4) (1905) 21 T. L. R. 305.
(5) (1889) 61 L. T. 384.
(6) (1856) 6 E. & B. 327.

dealing with the company, but also of the directors, must be considered: *South London Greyhound Racecourses, Ld.* v. *Wake* (1). If the court is with the plaintiff against Cromie and Strelitz, Morris does not get a good title to the shares even though he was acting bona fide. If, however, the court holds that he has a good title, it will be contended that, under s. 20 of the Companies Act, 1929, the plaintiff has a contract with the company that the business of the company shall be conducted in accordance with the articles, that Cromie and Strelitz have caused the company to break that contract, and that they have thereby committed a tort for which they are liable to the plaintiff in damages: *Lumley* v. *Gye* (2).

Hillaby in reply on the cases. In *South London Greyhound Racecourses, Ld.* v. *Wake* (3) the persons purporting to act with the authority of the company were acting fraudulently, and all that it decided was that, the seal of the company having been fixed without authority, the certificate was a forgery.

Cur. adv. vult.

1943. Dec. 14. COHEN J. read a judgment in which he stated the facts, and held that, if Morris had made such inquiries as the court might reasonably have expected him to make, he would not have discovered the defect in the appointment of Cromie and Strelitz as directors, and continued: Mr. Jennings argues that s. 143 and reg. 88 cannot apply where the persons purporting to act as directors knew of the defect in their title. He points out that, in all the cases, not only the person dealing with the company, but also the persons acting as directors, were unaware of the defect, but in principle I think that it is sufficient that the person seeking to rely on the regulation was himself unaware of the defect, and this view is borne out by the observations of Lord Cozens-Hardy M.R. in *Channel Collieries Trust, Ld.* v. *Dover, St. Margaret's and Martin Mill Light Rly. Co.* (4). In his judgment, after referring to the decisions in *Dawson* v. *African Consolidated Land and Trading Co.* (5) and *British Asbestos Co.* v. *Boyd* (6) Lord Cozens-Hardy goes on (7): "It has been

(1) [1931] 1 Ch. 496.
(2) (1853) 2 E. & B. 216.
(3) [1931] 1 Ch. 496.
(4) [1914] 2 Ch. 506.
(5) [1898] 1 Ch. 6.
(6) [1903] 2 Ch. 439.
(7) [1914] 2 Ch. 506, 512.

"argued for the appellants with great force that this is "a clause"—I pause to say that the clause to which Lord Cozens-Hardy there refers is s. 99 of the Companies Clauses Act, 1845, which corresponds to s. 143 of the present Act—"which ought not to be relied upon by persons who were "aware of the facts, although not aware of the legal conclusions "resulting from those facts, because such persons must be "taken to know the law, and it would be wrong that they "should take the benefit of s. 99. I am quite unable to "accept that view. It seems to me that the question may be "put very shortly: Aye or No, were the parties in this "transaction acting in good faith? If they were, s. 99 ought "to be available for all parties, including the directors them-"selves. If there is a lack of good faith, then of course the "court will not allow those who are lacking in good faith to "take the benefit of it." Then lower down the page, the learned Master of the Rolls says: "If there is good faith, "and I emphasize that, the mere fact that the person claiming "the benefit of the section had notice of the existence of the "facts which led to the disability is not sufficient to disentitle "him to rely upon it if he can honestly say 'I was not aware "'of the defect and the consequences of the facts I knew, "'I was not aware of the disqualification which now exists.'"

This statement of the law implies that the test is the good faith of the person seeking to rely on the section and regulation. It is, no doubt, a dictum in so far as it covers the case where some of the de facto directors are aware of the defect in the appointment of one or more of them, but it is in conformity with the principle of the rule in *Royal British Bank* v. *Turquand* (1), which is clearly available to an innocent party even though the persons purporting to bind the company knew that the authority which might have been conferred on him under the articles had not in fact been conferred. If I may say so with respect, the observations of Lord Cozens-Hardy which I have quoted seem to me good sense as well as good law, and I have no hesitation in applying them to the facts of the present case and holding that Mr. Morris is entitled to the benefit of the protection afforded by s. 143 and reg. 88.

For what purposes does Mr. Morris seek such protection?—(*a*) To validate his appointment as director; (*b*) to establish his title to the thirty-four shares allotted to him on March 30, 1942, and the seventeen shares transferred to him on April 20,

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(1) 6 E. & B. 327.

1942. I do not think either the section or the regulation can justify me in holding that Mr. Morris is a director. They protect persons dealing bona fide with the de facto directors of the company. They do not remove any difficulty that there may be in the appointment of any of them, but, none the less, Mr. Morris is, in my opinion, entitled to uphold the allotment to him of the thirty-four shares. When that was made he was, for the reasons I have already given, entitled to assume that Mr. Strelitz had been validly appointed a director. He was unaware that the defendants, Cromie and Strelitz, had vacated the office under reg. 73 of table A as varied by the company's articles of association, and he was, therefore, justified in believing that he had himself been validly appointed a director. In these circumstances he was unaware of the defect in the qualification of any of the de facto directors who made the allotment, and can rely on the section and regulation. Mr. Cromie and Mr. Strelitz cannot, however, do so, or claim to maintain their title to any shares allotted to them on March 30, 1942. The position as to the seventeen shares is different. They were originally allotted to the defendant, Strelitz, and by the time they were transferred to Mr. Morris the actions against the company had been commenced. Mr. Morris, however, is on the register in respect of these shares, and the onus is on the plaintiff to show why his name should be removed. To do so the plaintiff must establish, in my view, that when Mr. Morris acquired them on April 20, 1942, he was aware of the defect in the directors' qualification. I have found that he was not so aware on March 30, 1942. He was not a party to either of the actions before May 14, 1942, when he was added pursuant to the leave given on May 12, 1942. There is nothing in the minutes to show that the matter was brought before the board before May 18, and nothing in the evidence to fix Mr. Morris with knowledge of the proceedings before he was made a party to the action. In these circumstances, I am satisfied that Mr. Morris can maintain his title to the whole fifty-one shares now registered in his name.

In the result I find that the company has at present no directors validly appointed, and that the only persons whose names should be on the register of shareholders are Mr. Morris in respect of fifty-one shares and the plaintiff and the defendant, Cromie, in respect of one share each. I, therefore, propose to declare that there are at the present time no directors of the company, and to order that the register be rectified by removing the name of the defendant, Strelitz, therefrom, and by removing the name of the defendant, Cromie, therefrom as the holder of shares numbered 3 to 9 (both inclusive) and 77 to 100 (both inclusive), with the necessary consequential directions as to notifying the registrar of companies of such changes.

The company will repay 47*l*., as to 31*l*. to Cromie, and as to 16*l*. to Strelitz, which sums according to the evidence, were paid respectively by Cromie and Strelitz, in respect of the shares which I am directing should be struck off the register.

K. R. A. H.

Dec. 20. As a result of the decision that Morris was entitled to remain on the register of shareholders, as the holder of the shares, a question arose regarding the right of the plaintiff to recover damages from Cromie and Strelitz. He alleged, in his statement of claim, that by issuing and allotting the shares to Morris, they wrongfully procured a breach of the contract subsisting between the company and the plaintiff under s. 20 of the Companies Act, 1929, and that, by reason of that wrongful act, the value of the plaintiff's share in the capital of the company had been diminished, so that he had suffered loss.

Raymond Jennings and *M. Albery* for the plaintiff. Cromie and Strelitz, in acting as directors and allotting the shares to Morris when they were not de jure directors, caused a breach of the statutory contract between the company and the plaintiff, it being a term of that contract that the business of the company should be managed by a de jure board of directors. They are, therefore, personally liable to the plaintiff in tort for procuring a breach of the contract. [They referred to: Salmond on Torts, 9th ed., p. 388; *Said* v. *Butt* (1); *G. Scammell & Nephew, Ld.* v. *Hurley* (2); *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales* (3); *Pender* v. *Lushington* (4).]

Wynn Parry K.C. and *Richmount* for the defendants. *Coventry and Dixon's Case* (5) establishes that Cromie and

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(1) [1920] 3 K. B. 497, 503.
(2) [1929] 1 K. B. 419, 449.
(3) [1902] 2 K. B. 88, 96.
(4) (1877) 6 Ch. D. 70.
(5) (1880) 14 Ch. D. 660.

Strelitz were in no different position from that in which they would have been if they had been de jure and not de facto directors. This is not an ordinary contract, but a statutory contract of a limited character under s. 20 of the Companies Act, 1929, and any complaint by members of the company in respect of it must be enforced by the company: see *Welton* v. *Saffery* (1); *Mosley* v. *Alston* (2). The present claim is an attempt by the plaintiff to circumvent the whole body of authority which has been built up since 1847, and it is a device which, if successful, would enable every shareholder of a company who considered himself aggrieved to proceed individually for damages or for an injunction.

Christie K.C. and *Hillaby* for Morris.

Jennings replied.

Cur. adv. vult.

1944. Jan. 12. COHEN J. read a judgment, in which he stated the further question as to damages, and continued: On behalf of the plaintiff, it is contended (1.) that the articles of association of the company constitute a contract between the company and the plaintiff; (2.) that it is a term of that contract that the business of the company should be managed by a de jure board of directors; (3.) that that contract was broken when Cromie and Strelitz acted as directors of the company and allotted the shares which are now held by Morris; and (4.) that Cromie and Strelitz in so acting wrongfully procured a breach of the contract.

In support of the first of his propositions Mr. Jennings relied on the decision of Astbury J. in *Hickman* v. *Kent or Romney Marsh Sheepbreeders' Association* (3). After reviewing the cases dealing with the subject and pointing out certain apparently conflicting decisions, the learned judge summarized his conclusions in the following terms: "It is "difficult to reconcile these two classes of decisions and the "judicial opinions therein expressed, but I think this much "is clear, first, that no article can constitute a contract "between the company and a third person; secondly, that no "right merely purporting to be given by an article to a person, "whether a member or not, in a capacity other than that of

(1) [1897] A. C. 299, 315.
(2) (1847) 1 Phil. 790.
(3) [1915] 1 Ch. 881, 900.

"a member, as, for instance, as solicitor, promoter, director, "can be enforced against the company; and, thirdly, that "articles regulating the rights and obligations of the members "generally as such do create rights and obligations between "them and the company respectively." I think, therefore, that I am bound to proceed on the basis that the articles did constitute a contract between the company and the plaintiff, but that that contract regulates only the rights and obligations of the plaintiff in his character as a member of the company and not in any other respect.

The articles of association undoubtedly provide that the affairs of the company should be conducted by a board of directors elected as therein laid down, but they also include reg. 88 of table A, and I must, therefore, treat that regulation as forming part of the contract between the defendant company and the plaintiff. It is, no doubt, intended primarily for the protection of persons dealing with the company, but I think that it also has the effect that, in cases covered by it, the plaintiff is bound to recognize the validity of acts done by de facto directors. If that be so, I am unable to hold that the company has committed a breach of the articles for which the plaintiff is entitled to recover damages.

Mr. Jennings suggested that, if I reached this conclusion, I should be leaving the plaintiff without any remedy for any damage which he had suffered. In view of the conclusion which I reached on the main issues, I should have been sorry if this were so, but I do not think that this is the consequence of my decision, for, if the de facto directors were, in allotting or passing the transfer of the shares in question, committing an act which would, had they been de jure directors, have amounted to misfeasance, they are liable equally with de jure directors to make good to the company the damage arising from such misfeasance: see *Coventry and Dixon's Case* (1), where Jessel M.R. said: "I will consider for a moment "whether they are so brought within the description of "'any officer' of the Company." I pause to say that the Master of the Rolls was considering the misfeasance section of the Act of 1862. He then goes on to say: "No doubt "they were not properly elected and were, therefore, not de "jure directors of the company; but that they were de facto "directors of the company is equally beyond all question. "The point I have to consider is whether the person who acts

(1) 14 Ch. D. 660, 664.

"as de facto director is a director within the meaning of this "section, or whether he can afterwards be allowed to deny "that he was a director within the meaning of this section. "I think he cannot. We are familiar in the law with a great "number of cases in which a man who assumes a position "cannot be allowed to deny in a court of justice that he "really was entitled to occupy that position. The most "familiar instance is that of executor de son tort. In like "manner, it seems to me, in an application under this section, "the de facto director is a director for the purposes of the "section." The decision of the Master of the Rolls was reversed on other grounds, but his finding on the point dealt with in the passage which I have read has always been treated as good law. The plaintiff is, therefore, in my opinion, not without remedy, for he could recover through the company any damage which he had suffered as a member of the company.

Mr. Jennings pointed out that that would not really compensate him in this case because, as he said, before the improper issues of shares, the plaintiff was the holder of one out of two issued shares, and was, therefore, entitled to half the profits of the company, but the articles contain no contract that he shall remain in that position, and, if and so far as he sets up such a contract, he is, in my view, relying on a contract outside the articles, and, therefore, outside anything that was pleaded in this case—certainly outside the particular point with which I am now dealing. I, therefore, hold that the plaintiff's claim for damages based on the allotment and transfer of the shares to the defendant Morris fails.

Solicitors for the plaintiff: *G. F. Wallace & Co.*

Solicitors for the company, Cromie and Strelitz: *Paisner & Co.*

Solicitors for Morris: *Billinghurst, Wood & Pope.*

J. L. D.

VAISEY J.

1944

Jan. 13.

In re WITTKE, DECEASED.

REYNOLDS AND GORST *v.* KING EDWARD'S HOSPITAL FUND FOR LONDON AND CUSTODIAN OF ENEMY PROPERTY.

Emergency legislation—Trading with the enemy—Trust—Protective trust—Principal beneficiary resident in enemy territory—" Enemy" —Payment of income to Custodian of Enemy Property—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 33, *sub-s.* 1*—Trading with the Enemy Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *s.* 7, *sub-s.* 1 (*a*) (*b*)*—Trading with the Enemy (Custodian) Order,* 1939 (*St. R. & O.,* 1939, *No.* 1198), *arts* 1, 3.

By her will, a testatrix directed that her residue should be held " on protective trusts " (without specifying any period) for the benefit of her sister, with a discretionary power to resort to capital, and, subject thereto, on trust to pay the capital and income to a named charity. The sister and her husband were French and lived in France, and, on July 10, 1940, when an Order in Council extended to unoccupied France the provisions of the Trading with the Enemy Act, 1939, and of the orders made under it, they became " enemies," and money payable to them became payable to the Custodian of Enemy Property. In 1941 the testatrix died. Thereupon, if s. 33 of the Trustee Act, 1925, applied, under sub-s. 1 (i.) the income was to be held during the trust period on trust for the maintenance or support, or otherwise for the benefit of, the sister and her husband or one of them, as the trustees of the will should in their discretion think fit :—

Held, (1.) on construction, that the will incorporated s. 33, sub-s. 1, of the Trustee Act, 1925, and must be taken to contain a direction that the protective trusts were to operate during the life of the sister ; (2.) that as from the death of the testatrix the income was payable to the Custodian.

ADJOURNED summons.

By cl. 3 of her will, dated June 22, 1940, a testatrix directed that her residue should be held " (*a*) as to the income thereof " upon protective trusts for the benefit of my sister [naming " her] provided always that my trustees shall have power from " time to time to pay to my said sister the whole or any part " of the capital of my residuary estate in their absolute " discretion and subject thereto (*b*) upon trust to pay the " capital and income of my residuary estate to King Edward's " Hospital Fund for London . . . ." The sister and her husband were French nationals living in France, and had no living issue. By Order in Council, dated July 10, 1940, the provisions of the Trading with the Enemy Act, 1939, and of

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the orders made thereunder were extended to unoccupied France. The sister and her husband thereupon became enemies, and money payable to them became payable to the Custodian of Enemy Property. On October 26, 1941, the testatrix died, whereupon, if s. 33 of the Trustee Act, 1925 (1),

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(1) By Trustee Act, 1925, s. 33, sub-s. 1: "Where any income " . . . . is directed to be held on " protective trusts for the benefit " of any person (in this section " called 'the principal beneficiary') for the period of his life " or for any less period, then, during that period (in this section " called 'the trust period') the " said income shall . . . . be held " on the following trusts, " namely :—(i.) Upon trust for the " principal beneficiary during the " trust period . . . . or until any " event happens, other than an " advance under any statutory or " express power, whereby, if the " said income were payable during " the trust period to the principal " beneficiary absolutely during " that period, he would be deprived of the right to receive the " same or any part thereof, in any " of which cases, as well as on the " termination of the trust period, " whichever first happens, this " trust of the said income shall fail " or determine; (ii.) If the trust " aforesaid fails or determines " during the subsistence of the " trust period, then during the " residue of that period, the said " income shall be held upon trust " for the application thereof for " the maintenance or support, or " otherwise for the benefit, of all " or any one or more exclusively of " the other or others of the following persons (that is to say) " (*a*) the principal beneficiary and " his or her wife or husband, if " any, and his or her children or " more remote issue, if any . . . . " as the trustees in their absolute " discretion, without being liable " to account for the exercise of " such discretion, think fit."

By Trading with the Enemy Act, 1939, s. 7, sub-s. 1: "With " a view to preventing the payment of money to enemies and of " preserving enemy property in " contemplation of arrangements " to be made at the conclusion of " peace, the Board of Trade may " appoint custodians of enemy " property for England, Scotland " and Northern Ireland respectively, and may by order— " (*a*) require the payment to the " prescribed custodian of money " which would, but for the existence of a state of war, be payable to or for the benefit of a " person who is an enemy . . . . " (*b*) vest in the prescribed custodian such enemy property as " may be prescribed, or provide " for, and regulate, the vesting in " that custodian of such enemy " property as may be prescribed."

By Trading with the Enemy (Custodian) Order, 1939: " (1.) (i.) Any money which would, " but for the existence of a state of " war, be payable to or for the " benefit of a person who is an " enemy, and any money which is " to be deemed for the purposes of " the Act to be money which " would, but for the existence of a " state of war, be so payable, shall " be paid to the Custodian. " (ii.) Without prejudice to the " generality of the foregoing paragraph, there shall be paid to the " Custodian in particular any " money which would, but for the " existence of a state of war, be

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applied, the discretionary trusts contained in sub-s. 1 (ii,) arose. By this summons the trustees of the will asked, inter alia, whether, on the true construction of the will and of s. 33 of the Trustee Act, 1925, and in the events which had happened, the income of the residue was during the life of the sister or some other and if so what period payable (*a*) to King Edward's Hospital Fund for London as the only person who would, if the sister were actually dead, be entitled to the residue, or (*b*) to the Custodian of Enemy Property, or (*c*) was payable or applicable in some other and if so what manner.

T. D. D. Divine for the trustees.

Rawlence for King Edward's Hospital Fund for London. Clause 3 of the will does not state how long the trust period is to be, and so does not incorporate s. 33 of the Trustee Act, 1925. If, however, s. 33 is incorporated, and discretionary trusts have arisen, there is still strong objection to the trustees exercising their discretion thereunder by paying the income to the Custodian, for they cannot be sure that it will ever be applied for the benefit of the sister. Under art. 3 (ii.) of the Trading with the Enemy (Custodian) Order, 1939, the Custodian may, acting under a general or special order of the Board of Trade, pay it over to her or for her benefit, but the trustees cannot be sure that the Board of Trade will ever make such an order, and, therefore, they cannot properly exercise their discretion under s. 33, sub-s. 1 (ii.), of the Trustee Act, 1925, by paying it to the Custodian now. Thus, there is no means by which, during the war, either the sister or her

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" payable to or for the benefit of a " person who is an enemy, by way " of . . . . (*i.*) payment arising " under any trust, will or settlement. (3.) (i.) The Custodian " shall, subject to the provisions of " the next succeeding paragraph " and except in so far as the Board " of Trade either generally or in " any specific case may otherwise " direct or order, hold any money " paid to him under this order " . . . . until the termination of " the present war, and shall thereafter deal with the same in such " manner as the Board of Trade " shall direct. (ii.) The Custodian, " acting under a general or special " direction of the Board of Trade, " may at any time pay over any " particular money paid to him " under this order . . . . to or for " the benefit of the person who " would have been entitled thereto " but for the operation of the Act " or any order made thereunder or " to any person appearing to the " Custodian to be authorised by " such person to receive the same."

husband can have the benefit of any payments, and, therefore, the ultimate trust in favour of King Edward's Hospital Fund for London arises by virtue of the words " and subject thereto " in cl. 3 of the will.

Danckwerts for the Custodian of Enemy Property. If cl. 3 of the will does not incorporate s. 33 of the Trustee Act, 1925, King Edward's Hospital Fund for London cannot get the money, for in that case cl. 3 creates a trust to pay the income to the sister indefinitely, so that, but for the Trading with the Enemy Act, 1939, and the orders made thereunder, she would be entitled to call for the capital. The ultimate gift to the Hospital Fund introduced by the words " and subject thereto," makes no difference to the sister's right to call for the capital, for it is an attempt to impose on her absolute interest a trust which will interfere with the disposition by her of her own property and, therefore, is repugnant and void: *In re Cockerill* (1). If the testatrix did not intend the sister to have an absolute interest, she must have meant to give her a life interest. She mentioned no period in cl. 3 of the will, but it is clear that, by using the words " protective trusts," she was referring to s. 33 of the Trustee Act, 1925, which is the only section of any Act in which those words occur. Thus, as there is no living issue, the sister and her husband are the only possible beneficiaries, and the trustees must exercise their discretion in favour of one or both. Whatever they decide to do, the Custodian is the only person to whom payment can lawfully be made at the moment, and they will be properly exercising their discretion by paying the money to him. The sister and her husband are only technically " enemies." They are not hostile persons, and it is very likely that the Board of Trade may, at some time, make an order enabling the Custodian to pay it over to her or for her benefit, for example, in the event of a successful invasion.

VAISEY J. held that the words " protective trusts " referred to s. 33 of the Trustee Act, 1925, and continued: People who refer to these statutory provisions which are designed to be incorporated in wills ought to do so with care. My attention has been called to the fact that the will of the testatrix does not comply strictly with s. 33 because it does not direct the income to be held on protective trusts for the benefit of the

(1) [1929] 2 Ch. 131.

sister for a particular period, that is to say, her life or some less period, and it was argued that, that being so, the section is not effectively incorporated in this will. Reading the will as a whole, and disregarding, up to this point, the provisions of the war time legislation, except, of course, with regard to the fact that a forfeiture has arisen, I think that on the true construction of the will a life interest is given to the sister. The failure to define the interest might have resulted in there being an indefinite gift of income had not the trustees been given a discretionary power to pay the capital to the sister, which, I think, is quite inconsistent with any suggestion that the trust could be properly read as a trust for the payment of the income indefinitely, because, on that view of the will, the sister would have been entitled to call for a transfer of the capital. So, in my judgment, on the true construction of the will the section is incorporated because the sister's life must be regarded as the period during which the protective trusts are to operate. It follows that there is in the will a direction that as from the date of a forfeiture the income is to be held on trust to apply it for the benefit of the sister and her husband or one of them.

The question then arises whether that interest is caught by the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939, so that the Custodian of Enemy Property is entitled to call for payment of that income. In my judgment, no distinction can be drawn between the words "payable to or for the benefit of" in s. 7, sub-s. 1, of the Trading with the Enemy Act, 1939, and in the Trading with the Enemy (Custodian) Order, 1939, and the words "held upon trust for the application thereof for the "maintenance and support, or otherwise for the benefit of" in s. 33, sub-s. 1 (ii.), of the Trustee Act, 1925. Therefore, having regard to the construction of the will, the proper interpretation of the Trustee Act, 1925, and the true scope and intention of the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939, it follows that, as from the forfeiture of the determinable interest given to the sister, the income must be paid to the Custodian of Enemy Property until further order. I do not think that the argument can prevail that, because there cannot be any application for the personal benefit of the sister or of her husband, King Edward's Hospital Fund for London comes in by virtue of the words "subject thereto." The costs of all parties, as between solicitor and client, will be paid out of the arrears of income in so far as they are sufficient, and, in so far as they are not sufficient, out of capital.

Solicitors: *Reynolds, Sons & Gorst; E. F. Turner & Sons; Solicitor, Board of Trade.*

K. R. A. H.

In re HOOPER.

PHILLIPS *v.* STEEL.

UTHWATT J.
1943
Nov. 3; *Dec.* 21.

Will—Annuity—"Free of all duty" and "free of all deductions "whatsoever"—Freedom from income tax.

A testator bequeathed an annuity of 520*l.* "free of all duty ". . . . such annuity to begin from the date of my death and to "be paid free of all deductions whatsoever":—

Held, that the annuity was not given free of income tax.

In re Cowlishaw [1939] Ch. 654 not followed.

ADJOURNED summons.

By cl. 4 of his will, dated Dec. 28, 1932, a testator, who died on April 4, 1940, directed as follows:—"I give free of all "duty to . . . Mrs. Ouida Steel . . . an annuity of five "hundred and twenty pounds during her life without power "of anticipation such annuity to begin from the date of my "death and to be paid free of all deductions whatsoever by "equal monthly payments the first of which shall be paid "one month after my death." A summons was taken out by the executors of the will to determine whether the annuity was payable free of income tax or subject to the deduction of that tax.

Gutch for the executors.

Wilfrid Hunt for the annuitant. Although there are many authorities inconsistent with *In re Cowlishaw* (1), the present case is not distinguishable from that case, and the annuitant is, therefor, entitled to receive her annuity free of income tax. [He also referred to *In re Skinner* (2).]

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(1) [1939] Ch. 654.

(2) [1942] Ch. 82.

UTHWATT J.

1943

HOOPER, *In re.*

PHILLIPS *v.* STEEL.

Winterbotham for the residuary legatee. *In re Cowlishaw* (1) is not to be relied on as laying down any proposition of law. In view of the numerous authorities on the same point, decided before *In re Cowlishaw* (1) in which authorities it was held that annuities were not given free of income tax, that case cannot be regarded as laying down a rule that, whenever an annuity is given "free of all duty" or "free of all deductions whatsoever," that annuity is payable free of income tax. [He referred to *In re Loveless* (2); *In re Shrewsbury Estate Acts* (3); *Lethbridge* v. *Thurlow* (4); *Sadler* v. *Rickards* (5); *Gleadow* v. *Leetham* (6); *In re Saillard* (7).] The case is contrary to the authorities and need not be followed: see the observations of Jessel M.R. in *Osborne* v. *Rowlett* (8).

R. J. T. Gibson for a pecuniary legatee.

Cur. adv. vult.

Dec. 21. UTHWATT J. read the following judgment: The question for determination is whether the annuity is given free of income tax by reason of the direction that it is to be paid "free of all deductions whatsoever."

Annuities given by a will are charged to income tax under case III of sch. D of the Income Tax Act, 1918. The tax so charged is thrown on the annuitant by his compulsory submission to deduction of tax on the occasion of the payment of any instalment of the annuity as provided by rr. 19 and 21 of the General Rules Applicable to all Schedules. The annuity is paid in full, in part by cash paid to the annuitant, and in part by satisfaction in accordance with the provisions of the Act of the income tax exigible in respect of it. No deduction has in law or in fact been made from the annuity.

Testators frequently provide that an annuity of an amount specified by them is to be free of income tax or is to be paid without deduction of income tax. These words do not fit in at all comfortably with the provisions of the Income Tax Acts, for it is beyond the competence of testators to free an annuity from income tax. The income tax withheld on payment of an instalment of an annuity is not a deduction from the annuity; and, where part of the annuity is not payable out of profits and gains brought into charge, the withholding of the income tax appropriate to that part is obligatory on the payer. But the Income Tax Acts are not read as controlling the expressed intention of testators: see *Festing* v. *Taylor* (1). The intention disclosed by the use of these phrases (which are construed as identical in meaning) or phrases of similar import disclosing an intention to relieve the annuitant of the burden of income tax, is carried out by an appropriate increase in the money amount specified for the annuity, the increase being such as to enable the annuitant to receive the specified amount after the tax incident to the increased annuity in the hands of the annuitant has been satisfied in manner required by the Act. The annuity as specified by the testator in money is increased: the increased annuity is not free of income tax and tax is deducted on payment made to the annuitant. But the testator's intention has been carried out.

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(1) [1939] Ch. 654.

(2) [1918] 2 Ch. 1.

(3) [1924] 1 Ch. 315, 339.

(4) (1851) 15 Beav. 334, 339.

(5) (1858) 4 K. & J. 302.

(6) (1882) 22 Ch. D. 269.

(7) [1917] 2 Ch. 401.

(8) (1880) 13 Ch. D. 774, 779, 784.

The question which gives rise to difficulty is whether in any particular will there is, on its proper construction, shown an intention to make the annuity or the annual sum expressed to be payable a net sum after income tax has been accounted for. To achieve that object it is not necessary that income tax should in terms be referred to. The purpose sought to be achieved, for instance, a direction to pay the rates incident to devised property, or the use of an artless phrase—I hazard the example of a " life annuity of £1 a week spending money " payable every Saturday "—may well show an intention that the sums are to be net sums after tax has been accounted for. The only thing necessary is an adequate expression of the testator's intention. In this case the words used are " to be " paid free of all deductions whatsoever," and they have to be construed, not in any general sense, but as part of the will in which they find a place.

One is not, however, without assistance from the reported cases as to the meaning of that phrase. The cases are many in number. That is due, perhaps, to the presence in some of the older books of precedents of the words " clear of all " deductions whatsoever " as part of the common form in a gift of an annuity: see, for instance, Martin's Practice of Conveyancing Precedents, vol. v., p. 21. These words are not, so far as my researches have gone, common form in the will forms contained in modern books of precedents. This, perhaps, may be due to Davidson's influence on the work of his successors, for, in his Precedents in Conveyancing, 2nd. ed., published in 1864, he proclaimed (vol. iv,, p. 351) that his will forms do not use the general words "without deduction," observing that where terms of that description are used the question of construction, whether the annual sum is given free from deduction for income tax, is one of great nicety and that it is inexpedient to use ambiguous terms. Davidson's warning has been neglected, and the cases have multiplied since he wrote. The effect of the cases, which begin with *Lethbridge* v. *Thurlow* (1), decided in 1851, and continue in a stream to the present day, is that income tax is not to be regarded as included in a direction to pay an annuity "free "from deductions" unless there is shown in the will an intention that income tax is to be treated as a deduction. That construction has become the rule of the road. It is not necessary to refer in detail to the cases. I refer only to two of them by way of example. In *Abadam* v. *Abadam* (2), the phrase used was "without any deduction whatever," and in the absence of any context sufficient to expand the meaning of "deduc-"tion," this phrase was held not to include income tax. In *Gleadow* v. *Leetham* (3) (where the words were "the clear "yearly sum . . . free from all deductions and abatements "whatsoever") Kay J. stated that in light of the presence of the word "abatements" he found it difficult to give any meaning to the word "deductions" unless it included "income tax." No other meaning was or, so far as I can see, could have been suggested for that word. The annuity was, however, held not to be given free of income tax.

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(1) (1862) 11 W. R. 70.

I turn now to the will of this testator. There are three matters to be observed. First, the will throughout is expressed in technical terms. Colloquial language is absent. Second, the phrase "free of all deductions whatsoever" has no application to anything, unless income tax is treated as a deduction. Freedom from death duty is expressly provided for. The professional charges authorized by the will could not in any event fall on the annuity. The possibility that in the future there might be appointed a trustee entitled to remuneration part of whose charges might otherwise fall on the annuity is not contemplated by the will and should not, in my opinion, be taken into account in construing it. Third, the rest of the will contains nothing to suggest that income tax is treated as a deduction. The sole question therefore is whether, in the absence of any explanatory matter, it is proper to draw the inference that income tax was treated by the testator as a deduction for the purpose of this gift merely from the fact that, unless so treated, the phrase has no application at all. It is, no doubt, a sound rule of construction that, where words are susceptible of several interpretations, that interpretation should be adopted which will give some effect to every expression rather than one which will render any of the expressions inoperative. This must, however, not be pressed too far, for, as Lord Selborne pointed out in *Giles* v. *Melsom* (1), " Nothing can be more mischievous than " to attempt to wrest words from their proper and legal meaning " only because those words are superflous," and, as Lord Romer pointed out in *Perrin* v. *Morgan* (2), in the course of observations on the function of settled rules of construction: " It is, no doubt, of great importance to lawyers and others " engaged in the preparation of wills that they should have " the certainty of knowing that certain well-known words and " phrases will receive from the court the meaning that the " court has for generations past attributed to them." In my view, it would not be right to construe the will as giving a tax-free annuity. Income tax is not a deduction, and the will is expressed in technical terms. An expression of positive intention to treat income tax as a deduction is entirely absent. It is, I think, the sounder course to treat the phrase " without " any deductions whatsoever " as meaningless rather than, in an instrument drawn in technical terms, to attribute to it a meaning which it does not bear in law and which has consistently been denied to it by authority for nearly a century. In *In re Cowlishaw* (3) Bennett J., in construing a will which I cannot distinguish from the will under consideration, came to the opposite conclusion to that at which I have arrived. He found himself unable to hold a similar direction meaningless. It is only with great diffidence that I differ from that learned judge, but it is to be observed that in *In re Cowlishaw* (3) there was no such citation of authority as showed the consistent meaning given to the phrase

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(1) 15 Beav. 334.
(2) (1864) 33 Beav. 475.
(3) 22 Ch. D. 269.

(1) (1873) L. R. 6 H. L. 24, 33.

(2) [1943] A. C. 399, 420.

(3) [1939] Ch. 654.

UTHWATT
J.

1943

HOOPER
In re.
PHILLIPS
v.
STEEL.

"without deductions" in many different wills over a long period, that *In re Cowlishaw* was distinguished on this ground by Simonds J. in *In re Wells' Will Trusts* (1), and that Bennett J. himself observed on *In re Cowlishaw* (2) in *In re Best* (3).

I, accordingly, declare that the annuity is not given free from the income tax to which it is subject. I would only add this. The larger part of income tax is at the present time collected by deduction at the source, and under promised legislation that method of collection is being extended. The association of income tax with "deduction" will no doubt therefore become more direct and more obvious to many people. But that will not alter the meaning to be attributed to the phrase "without deduction" in the gift of an annual sum. If a testator means a specified annuity to be received clear of income tax, he should say so in express terms, and not use a general formula. In so doing, a testator would not, in the general case, be abandoning an accustomed method of stating his ideas, for views on income tax are not usually conveyed under the cover of an amiable general phrase.

Solicitors: *Beachcroft & Co.; Pothecary & Barratt, for Hawkins & Co., Hitchin; Syrett & Sons.*

J. L. D.

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istinguished. *Re* PURNCHARD'S
ILL TRUSTS. [1948] 1 All E.R. 790.

Distinguished. *In re* PURNCHARD'S
WILL TRUSTS. **[1948] 1 Ch. 312**

In re EVERETT.

PRINCE *v.* HUNT AND OTHERS.

COHEN
J.

1944

Jan. 20.

Will—Construction—Bequest of "all my stocks and shares"—Stocks and shares in limited companies—Redeemable debenture stock—Government and public authority stocks.

A testatrix, by her will, directed her trustees to "sell my "freehold premises . . . and all my stocks and shares and to "divide the net proceeds of sale between [four named persons]

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(1) [1940] Ch. 411.
(2) [1939] Ch. 654.
(3) [1942] Ch. 77.

"share and share alike." Some of her investments were stocks and shares in limited companies, the others were redeemable debenture stock, holdings in public utility companies, and Government securities :—

Held, that the natural meaning of "stocks and shares" was stocks and shares in limited companies, that there was nothing in the circumstances of the case to extend that meaning, and that, therefore, only the stocks and shares in limited companies passed under the bequest.

ADJOURNED summons.

By her will, dated March 14, 1942, the testatrix appointed executors and trustees, and bequeathed pecuniary legacies amounting to 770*l*., and specific articles. By cl. 3 she provided : "I direct my trustees to sell my freehold premises . . . . and "all my stocks and shares and to divide the net proceeds of "sale between [four persons, naming them] share and share "alike." On April 25, 1943, the testatrix died, her estate then comprising freehold premises and a number of investments. Some of the investments were stocks and shares in limited companies. The others, which were set out in a schedule to the summons, were redeemable debenture stock in the London Power Company, Ld., holdings in public utility bodies, and various government securities. By this summons, one of the trustees of the will asked whether all, or, if not all, which, of the investments set out in the schedule were included in the bequest of "all my stocks and shares."

Droop for the trustee.

Hewins for the legatees of the stocks and shares. The bequest includes all the investments which are set out in the schedule. "All my stock" means everything that, in name or in substance, is stock, and "all my shares" means all my shares in the capital of limited companies. In the Oxford English Dictionary, vol. IX., part 1, at p. 992, stock is defined as "The subscribed capital of a trading company or the "public debt of a nation, municipal corporation, or the like, "regarded as transferable property held by the subscribers "or creditors, and subject to fluctuations in market value. "Also, in particularized sense, a kind of stock, a particular "fund in which money may be invested." The second paragraph of the note to that definition is : "In modern "British use the application of the word is narrowed ; the "subscribed capital of a public company is called *shares* "when it is divided into portions of uniform amount, and "*stock* when any desired amount may be bought or sold. In "British use, also, when there is no specific indication, stock "is usually taken to refer to those portions of the national "debt the principal of which is not repayable, the government "being pledged only to the payment of interest in perpetuity." In this bequest the words "stocks and shares" are clearly cumulative. Something is meant to be carried by "stocks" which is not carried by "shares," and vice versa. Had the testatrix simply said "All my shares," all her capital in limited companies, stock as well as shares, would have passed: *Morrice* v. *Aylmer* (1); *In re Bodman* (2) per Chitty J.; *In re McEacharn's Settlement Trusts* (3). Therefore, she must have meant something further by "stock." The court cannot look at the circumstances of the case to see whether, if the widest construction is given to the phrase, there will be enough left to pay the funeral and testamentary expenses, pecuniary legacies and debts: *Higgins* v. *Dawson* (4).

Rawlence for the residuary legatees. The true meaning of "all my stocks and shares" in this bequest is shares or stock in the capital of limited companies: *Sellar* v. *Charles Bright & Co., Ld.* (5). That is an ejusdem generis construction, applicable to a double-barrelled phrase such as "stocks and "shares." Neither the definition in the Oxford English dictionary, nor the authorities which have been cited, are of any help. The meaning of the words to be construed depends on the context, and the fact that, in certain contexts, "stock" may include shares, does not help in interpreting the phrase "stocks and shares."

COHEN J. I have to decide whether the securities in the schedule pass to the legatees of the stocks and shares or fall into residue. If the wider construction is placed on cl. 3 and all the securities pass under the gift in it, there will be barely enough to discharge the testamentary expenses and debts, and probably nothing left for the legacies. Mr. Hewins asks me to read the words "all my stocks and shares" in cl. 3 as equivalent to "all my investments." If I had to construe the will apart from authority, I would conclude, on finding the

(1) (1874) L. R. 10 Ch. 148.

(2) [1891] 3 Ch. 135, 136.

(3) [1939] Ch. 858.

(4) [1902] A. C. 1.

(5) [1904] 2 K. B. 446.

word "stocks" with the word "shares," that the meaning of the words was stocks and shares of a limited company. The matter, however, is not free from ambiguity, and I can look at the circumstances. Mr. Hewins contended that the word "shares" can, of itself, include stock, and that I can so construe it in the present case on the basis of *Morrice* v. *Aylmer* (1) and the other authorities which he cited. That is true, but those authorities do not help me to come to a conclusion in the present case, and, in my judgment, consideration of the circumstances leads to a conclusion opposite to that which Mr. Hewins invites me to reach, for I find that the estate is of such a character that, were I to give the words the construction for which he contends, I should be deciding that the testatrix, by using those words, had disposed of the whole of her personal estate save cash in hand and in the bank and goods in the house. I cannot think that a testatrix who had bequeathed substantial specific pecuniary legacies could have intended to bequeath all her investments to the legatees of the stocks and shares. Mr. Hewins contends that I cannot look at the circumstances, in the sense that I am not entitled to inquire whether the effect of the construction for which he contends would be that there would be insufficient funds to pay the debts, funeral and testamentary expenses and pecuniary legacies: *Higgins* v. *Dawson* (2). I am not, however, relying on circumstances for that purpose. I base my decision on the ground that the natural meaning of "stocks and shares" is stocks and shares in limited companies, and the only use that I make of circumstances in the present case is to come to the conclusion that I find nothing in them to extend that natural meaning.

Solicitor for the trustee and for residuary legatees: *S. Bregan.*
Solicitor for legatees of stocks and shares: *Mark Lemon.*

(1) L. R. 10 Ch. 148.
(2) [1902] A. C. 1.

K. R. A. H.

SIMONDS J.

1943

Dec. 6, 13.

1944

Jan. 17.

In re RING SPRINGS, LIMITED'S LETTERS PATENT.

Patent—Extension—Patentee a British company—Majority of shares held by enemy company—Order vesting shares in Custodian of Enemy Property—Sale to British subjects—Period of extension—Patents and Designs Acts, 1907 *to* 1942, *s.* 18, *sub-s.* 6.

On September 3, 1939, an English company owned three letters patent under an agreement with a German company which enabled the English company to acquire patents to the benefit of which the German company might from time to time become entitled. Clause 8 of the agreement provided that the English company should pay to the German company one quarter of all moneys received by it under the patents. In 1939 the English company granted a licence to manufacture and sell under the patents, but on the outbreak of war the licensee was forbidden to use for the manufacture the machinery which had been set up for it, and was directed to use it for work of national inportance. Most of the issued shares in the capital of the English company were held by the German company, and the rest of them by British directors of the English company. On January 13, 1941, those held by the German company were vested by an order of the Board of Trade in the Custodian of Enemy Property, who, on May 15, 1942, sold them to the British directors. On February 15, 1943, the first of the three patents expired, and on April 20, 1943, the second and the third expired :—

Held, that, as the business of the English company was not carried on wholly or mainly for the benefit of the German company, the English company was not precluded by the proviso to s. 18, sub-s. 6, of the Patents and Designs Acts, 1907 to 1942, from applying for an extension of the patents, and that the proper extension in each case was for a period equal to the period from the date of the vesting order to the date of the expiration of the patent.

ADJOURNED summons.

By an agreement, dated October 18, 1926, a German company agreed to sell, and an English company to buy, patents to the benefit of which the German company might from time to time become entitled. Clause 8 of the agreement provided that the English company should pay to the German company one quarter of all moneys received by it as purchase money, royalties or otherwise from the sale of the patents or grant of licences under them. In 1939 there were vested in the English company, pursuant to the agreement, three letters patent, the first dated February 15, 1927, and the second and third April 21, 1927. The English company granted a licence to manufacture and sell under the patents, and the licensee imported from Germany, in August, a special rolling mill for the work. At the outbreak of war the German company owned all the issued shares of the English company except 700, which were owned by three British directors of the English company. The Minister of Supply allowed the mill to be set up only for work of national importance, and then only on condition that it should be kept in being for ten years after the end of hostilities and used for making certain articles so long as he wanted them. Thus, the English company's business in connexion with the inventions comprised in the patents was ended. On January 13, 1941, the Board of Trade made an order vesting in the Custodian of Enemy Property the shares held by the German company, and on May 15, 1942, the Custodian sold these shares to the British directors of the English company. On February 14, 1943, the first patent expired, and on April 20, 1943, the second and the third expired. By this summons the English company asked for an order, under s. 18 of the Patents and Designs Acts, 1907 to 1942 (1) that, notwithstanding that the six months mentioned in sub-s. 1 had commenced to run, the time within which application for extension might be made might be enlarged, and that the term of each of the three letters patent might be extended for four years or for such other period as the court might think fit having regard to the loss or damage suffered. The respondents to the summons were the Comptroller-General of Patents and the licensee.

James Mould for the English company and the licensee. The English company has lost the benefit of the inventions

(1) By s. 18, sub-s. 1: "A "patentee may . . . . present "a petition to the court praying "that his patent may be extended "for a further term, but such "petition must be presented at "least six months before the time "limited for the expiration of the "patent."

By sub-s. 6: "Where, by "reason of hostilities between His "Majesty and any foreign state, "the patentee as such has suffered "loss or damage (including loss of "opportunity of dealing in or "developing his invention owing "to his having been engaged in "work of national importance connected with such hostilities) an "application under this section "may be made by originating "summons instead of by petition, "and the court . . . . may have "regard solely to the loss or "damage . . . . Provided that "this sub-section shall not apply "if the patentee is a subject of "such foreign state as aforesaid, "or is a company the business "whereof is managed or controlled "by such subjects or is carried on "wholly or mainly for the benefit "or on behalf of such subjects ". . . ."

comprised in the patents from the date of the outbreak of war and should be granted an extension of the patents.

Lloyd-Jacob for the Comptroller-General. The English company is within the proviso, and so cannot properly apply for an extension. When the German company held most of the shares, or the Custodian held them on its behalf, the business of the English company was "carried on wholly or "mainly for the benefit or on behalf of" the German company, and when the British directors bought the shares they knew what the position was. The English company is, therefore, in the dilemma that, either in estimating the purchase price of the shares, the value of the possible extension of the patents was included and the German company was paid for that value, or else no value was attached to such a possible extension so that the English company cannot now satisfy the court that an extension ought to be granted. True, in *In re Stirling's Patent* (1) the court was satisfied that the applicants were not within the proviso, but it was not put to the court that, if the possibility of an extension was taken into account in fixing a price for the shares, any extension of the patent which might be granted would be for the benefit of the vendor. As to the right of the German company under the agreement to one quarter of the gross royalties it is true that, when enemy property vests in the Custodian, the beneficial ownership is in statutory abeyance: *In re Münster* (*Enemy*) (2), but that authority applies only to the shares which had been held by the German company and not to the German company's right to one quarter of the gross royalties which is a continuing right and has not been vested in the Custodian. That right may well mean that, after the war, the German company may prove to be the only recipient of profits after all expenses have been paid. Also, the German company may be entitled to claim the patents back after the war on the ground that it parted with them only by an assignment pursuant to an arrangement whereby it was to secure a continuing benefit, and that, as the continuing benefit was terminated, the consideration for the transfer of the patents was not fulfilled. In any event, only limited extension ought to be granted, the proper extension in each case being for a period equal to the period from January 13, 1941, to the date of the expiration of the patent.

(1) (1928) 46 R. P. C. 133. (2) [1920] 1 Ch. 268.

Mould in reply. The English company is not within the proviso. Working these patents is only part of its business. It is not the main part, and, therefore, the quarter of the profits which it agreed to give to the German company cannot ever be the main part of its profits. Moreover, the right of the German company to receive the quarter was ended by the outbreak of war, for the agreement was executory and involved communication between the two parties for its future performance: *Ertel Bieber & Co.* v. *Rio Tinto Co.* (1); *Halsey* v. *Lowenfeld* (2); see also *Schering, Ld.* v. *Stockholms Enskilda Bank* (3) where it was held that the principle relating to the abrogation of executory contracts applied to a contract with a neutral only if performance of it would, or in all probability would, enhance enemy resources. The English company could not properly have made the application when the German company owned most of its shares, but it is not, and never has been, itself an enemy company. [He referred to *Sovfracht (V/O)* v. *Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)* (4) and *Daimler Co., Ld.* v. *Continental Tyre and Rubber Co. (Great Britain), Ld.* (5). It can make the application now, and the fact that formerly it could not have done so is immaterial. There is no dilemma, as it has been suggested that there is. If the British directors paid an enhanced price for the shares in view of the possibility of an extension being obtained, they have, as it were, bought the loss and paid the money for it to the Custodian. That is quite different from paying it to the German company. The German company has never been able to claim that part of the purchase price, and it will be for the Custodian to determine, at some future date, whether it can go to the German company. The English company is entitled to an extension in respect of the whole of the period beginning with January 13, 1941. It is immaterial that the Custodian held the shares for some part of that period, unless it can be shown that the business of the English company was so conducted while the Custodian held the shares that the German company might receive some of the benefit accruing to the English company from any extension which might be granted. There has been no attempt to show that any such benefit might pass to the German company. The loss to the English company has

(1) [1918] A. C. 260.
(2) [1916] 2 K. B. 707
(3) Ante p. 13.
(4) [1943] A. C. 203.
(5) [1916] 2 A. C. 307.

accrued from the first day of the war, and the extension in the case of each patent should be granted for a period equal to the period from September 3, 1939, to the expiration of the patent.

Cur. adv. vult.

1944. Jan. 17. SIMONDS J. read a judgment in which he stated the facts, and continued : Apart from the question that arises under the proviso to s. 18, sub-s. 6, I should have no difficulty in granting an extension of the letters patent for the full period of the war. The evidence shows clearly that the English company's business and opportunity of business in connexion with the relevant inventions were brought to a complete termination by the outbreak of war. The question is, however, whether and to what extent the company is to be excluded from the benefit of the sub-section on the ground that the English company is " a company the business whereof " is managed or controlled by such subjects or is carried on " wholly or mainly for the benefit or on behalf of such " subjects "—" such subjects " meaning subjects of a foreign state with which His Majesty is at war. There are two separate aspects to this question. First, it is said that (apart from the shareholding of the English company) the business of the English company is carried on wholly or mainly for the benefit of the German company. This contention is founded on cl. 8 of the agreement of October 18, 1926, which provided for the payment by the English company to the German company of one quarter of all sums of money or other consideration received by the English company either by way of purchase money or by way of royalty or otherwise howsoever from the sale of or the grant of licences under the patents subject to the agreement. A provision of this kind requires anxious consideration, but I think that in this case the facts displace the suggestion that the business of the English company comes within the relevant proviso. It is not a matter on which it is possible or desirable to lay down any general rules. The word " mainly " in the proviso is itself sufficiently vague. It is, I think, sufficient to say, without attempting to define the border line, that each case must be examined on its own facts and that in this case the condition of the proviso is not, on this ground, satisfied.

Secondly, it is said that (*a*) for the period from the outbreak of war to January 13, 1941, the date of the vesting order, and (*b*) for the period from the latter date to May 15, 1942, the date of the sale to the British directors, the business of the English company was carried on for the benefit of the German company. I have thus divided up the period before the English company's shares came to the hands of the British directors, because it appears to me that different considerations apply to the two parts of it. It could not, I suppose, be doubted that, if a patent was vested at the outbreak of war in an enemy subject and in the course of the war was transferred to a British subject, the latter could not claim to be compensated under the sub-section for any loss or damage sustained by the former during that part of the war in which the patent was vested in him. I entertain no doubt that by parity of reasoning where the patentee is an English company and the whole of the shares or the majority of them belong beneficially to an enemy subject the English company cannot claim under the subsection in respect of the period during which that state of affairs continues. The language of the proviso is amply wide enough to cover such a case, and it appears to me to accord with its obvious purpose to give that effect to it. I, therefore, hold that, in regard to the period up to January 13, 1941, I cannot take into consideration any losses suffered by the English company.

The greater difficulty arises in regard to the period between the vesting in the Custodian and the sale by him of the shares. It was held that the effect of a vesting order under the Trading with the Enemy Acts in the last war was to create an anomalous position—otherwise almost unknown to our law—the beneficial ownership of vested property was in statutory abeyance (see *In re Münster (Enemy)* (1)). In this respect I can see no different result arising from a vesting order made under the present Trading with the Enemy Acts. If so, from the date of the vesting order, January 13, 1941, to the date of the sale, the beneficial ownership in the shares formerly held by the enemy was in statutory abeyance. The legal title was in the Custodian.

I have to apply to this set of facts the words of the proviso. Can I predicate of this period that the business of the English company was then carried on wholly or mainly for the benefit of the German company? It is, I think, impossible to do so. If the proviso is to operate it must be shown affirmatively that the case falls within it. What may happen as the result

(1) [1920] 1 Ch. 268.

SIMONDS J.

1944

RING SPRINGS, LD.'S LETTERS PATENT, *In re.*

of further war legislation or Treaties of Peace to the property of enemy subjects vested in the Custodian, or its proceeds, lies in the future. The German shareholders may or may not in the days to come get in cash or in kind the proceeds of sale of their shares ; in either case I cannot say that during the period in question the business of the English company was in fact carried on for their benefit. I have been referred to certain cases in which the question that I now have to decide appeared to arise. But I am unable, from the short judgments that were delivered, to discover the ratio decidendi. I must, therefore, follow my own judgment in the matter. I decide, accordingly, that I can in each case grant an extension for a period equal to the period from the date of the vesting order, namely, January 13, 1941, to the expiration of the patent.

Solicitors : *Messrs. Bristows, Cooke & Carpmael ; Solicitor, Board of Trade.*

K. R. A. H.

SIMONDS J.

1944

Jan. 26.

In re GIFFORD.

GIFFORD *v.* SEAMAN.

Will—Construction—Falsa demonstratio—Legacy of "war bonds"—Conversion before will of national war bonds into consolidated stock—Purchase after date of will of national savings certificates and defence bonds.

A testatrix, by her will, made in 1938, gave her estate to trustees upon trust (inter alia) "to pay the income derived from "my war bonds" to H. M. during her life, and after her death to sell the same and divide the proceeds among the children of M. H. absolutely. The testatrix had no war bonds at the date of her will, but in 1920 she had purchased 600*l.* war bonds which in 1928 were converted into consolidated inscribed stock. After she made her will she purchased 500 national savings certificates, and 200*l.* defence bonds :—

Held, applying the rule of falsa demonstratio non nocet, that the consolidated stock passed under the bequest, but that the national savings certificates and defence bonds, being acquired after the date of the will, did not so pass, but were part of the residue.

In re Price [1932] 2 Ch. 54 followed and applied.

By her will, dated January 27, 1938, the testatrix, Eliza Ann Gifford, after appointing her executors, devised and

SIMONDS J.

1944

GIFFORD, *In re* GIFFORD *v.* SEAMAN.

bequeathed all the residue of her estate to her trustees on trust for payment of her funeral and testamentary expenses and debts, and then " upon trust to pay the income derived " from my war bonds, my shares in the Brompton, Chatham, " Gillingham and Rochester Water Co. and the net income " derived from my four houses " [described] " to my grand- " child Mabel Annie Hayhurst during her life and at her decease " upon trust for all her children as and when they attain the " age of twenty-one years or if only one child then to that " child absolutely or if found desirable upon trust to sell the " same and divide the net proceeds thereof between all her " children absolutely," and then on further trusts set out in the will. At the date of her will the testatrix did not possess anything which could be described as a war bond. She had 740*l*. 12*s*. 2*d*. four per cent. consolidated inscribed stock, which represented 600*l*. five per cent. national war bonds which she had purchased in 1920 and which, under the option given by the Treasury, had been, first, converted into 633*l*. five per cent. Treasury bonds and, subsequently, into the 740*l*. 12*s*. 2*d*. four per cent. consolidated stock in 1928. She also possessed at the date of her death, but not at the date of her will, 500 national savings certificates and 200*l*. three per cent. defence bonds. The testatrix died in 1941, and her executors took out this summons to have determined whether the consolidated inscribed stock, the national savings certificates, and the defence bonds, or any and which of them, passed under the bequest of " war bonds."

J. A. Reid for the executors.

Myles for the residuary legatee. The expression " my " war bonds " is not an apt description of the consolidated stock or even of the defence bonds, and neither of these passed under the legacy. The national savings certificates do not produce any income, and so they cannot be included. If the words used are wide enough to pass either the consolidated stock or the defence bonds, they do not pass the other : *In re Weeding* (1) ; *In re Price* (2). The former decision is criticised in Jarman on Wills, and in the latter case Eve J. evidently considered that he was going to the furthest limit of the rule falsa demonstratio non nocet. The latter case is distinguishable on the facts.

(1) [1896] 2 Ch. 364.

(2) [1932] 2 Ch. 54.

SIMONDS J.

1944

GIFFORD, *In re*
GIFFORD
v.
SEAMAN.

Jopling for the legatee, Mrs. Hayhurst. The testatrix was describing property which she thought she possessed at the date of her will, not what she might possess when she died. She had originally owned national war bonds, and she still thought of her holding as " war bonds " although they had been converted into consolidated stock. The words of the gift are also sufficient to cover the defence bonds which she afterwards acquired. There are other misdescriptions in the will; the shares in the water company had been converted into stock, and its name changed. The case is covered by Eve J.'s decision in *In re Price* (1), so that both the consolidated stock and the defence bonds pass under the gift of " war bonds " and the rule of falsa demonstratio: see also Wills Acts, 1837, s. 24.

SIMONDS J. (having stated the facts). If the consolidated stock is to pass, it must do so under the principle of falsa demonstratio non nocet, which means that, if, on consideration of the relevant parts of the will, one comes to the conclusion that the testatrix intended to pass something and can determine what that something is, then the fact that she has given it a wrong description will not prevent her will taking effect in regard to that which is wrongly described. Is there here any material on which I can come to the conclusion that when the testatrix referred to " my war bonds " she intended to refer to the consolidated inscribed stock? As has been pointed out, not only in this but in other descriptions the testatrix has made mistakes. That is relied on as a pointer to the fact that she was not accurate in the description of the property which she intended to pass by her will. I have felt a great deal of difficulty about these points, but on the whole I think I can follow the decision of Eve J. in *In re Price* (2), where the learned judge, finding a legacy of " my " 400*l*. five per cent. war loan 1929/47," and that the testatrix never had any war loan but some time before the date of her will had acquired 400*l*. national war bonds which had been converted into conversion stock and treasury bonds, held that those converted stocks passed under the description " war " loan." The learned judge said: " The conclusion seems to " be irresistible that the testatrix regarded any investment she " made in securities created for the purpose of helping the " country during the war as ' war loan,' and I think I should

(1) [1932] 2 Ch. 54.

"be shutting my eyes to what everybody must in his own "mind regard as obvious if I were to hold that the mis-"description is fatal to the gift. Even if it involves carrying "the rule of falsa demonstratio further than it has yet been "carried, I feel bound to hold that this clause operates to "vest in the legatee the two sums of 284*l.* three and a-half "per cent. conversion stock and 211*l.* five per cent. Treasury "bonds." I feel some little doubt whether I am not carrying the rule even a little further than Eve J. did, but, if I do, it is so little further that I think I should be justified in doing it. Accordingly, I must hold that the testatrix, by her reference to "my war bonds," intended to pass the inscribed stock which represented the national war bonds which she had theretofore held.

Then I come to the question of the national savings certificates and the defence bonds. Those, as I pointed out, were purchased after the date of the will, and, however much I may extend the rule of falsa demonstratio non nocet to property which the testatrix had at the date of her will, I see no ground for assuming that she was falsely describing property which she did not then possess and, so far as I know, did not contemplate possessing. Accordingly, it does not appear to me that there would be any justification for extending the rule so as to cover the savings certificates and the defence bonds. Even if I were inclined to accede to counsel's proposition that s. 24 of the Wills Act would operate in this case to include within the scope of the gift war bonds which at the date of the will the testatrix did not possess, I see no ground for using s. 24 so as to cover property which was not war bonds and could only pass as war bonds if the principle of falsa demonstratio non nocet were applied to them.

Accordingly, I must answer the question put to me by declaring that the 740*l.* 12*s.* 2*d.* four per cent. consolidated inscribed stock passes under the trust contained in the will "to pay the income derived from my war bonds . . . . to my "said grandchild Mabel Annie Hayhurst during her life," and also by declaring that the national savings certificates and the 200*l.* three per cent. defence bonds do not so pass.

Solicitors: *Gregory, Rowcliffe & Co., for Wood, McLellan & Williams, Chatham.*

H. L. L.

VAISEY
J.

1944

Jan. 20, 21.

In re BORNE.

BAILEY *v.* BAILEY.

Will—Legacy—Ademption—Failure for uncertainty—Bequest of Dominion stock—Compulsory acquisition by Treasury—Acquisition of Securities (*No.* 5) *Order* (*St. R. &. O.*, 1941, *No.* 1575), *art.* 1 ; *sch.*

A testatrix, by her will, made in 1935, bequeathed " all my " personal effects and 300*l.* Union of South Africa stock " to one Elizabeth Bailey. The testatrix possessed 300*l.* of that stock at the date of her will, but before her death it had been acquired by the Treasury at a fixed price under the Acquisition of Securities (No. 5) Order, 1941. After her death the stock was transferred, and the executors were paid its value :—

Held, that the legacy, being a general legacy, was not adeemed by the order, and that it did not fail for uncertainty, but that the legatee was entitled to the sum received for the stock.

In re Gray (1887) 36 Ch. D. 205 distinguished.

ADJOURNED summons.

The summons was taken out by the executors of the will of the testatrix, Emily Alice Borne, to determine whether a legacy of " my personal effects and 300*l.* Union of South " Africa Stock " was adeemed or failed for uncertainty owing to the requisition of the stock by the Treasury under the Acquisition of Securities (No. 5) Order, 1941 (1), before the death of the testatrix. The facts are stated in the headnote.

Michael Albery for the legatee, Elizabeth Bailey. This is a general, and not a specific legacy, and there can be no failure

(1) By Acquisition of Securities (No. 5) Order, 1941 : " 1. All " sterling securities of the description mentioned in the first " column of the schedule to this " order, ... are hereby transferred to the Treasury at the " price specified in the second " column of that schedule in " relation to those securities respectively . . . .

" Schedule.

" Title of Security.	Price per 100*l.* nominal
"	
" Union of South Africa " 5 per cent. Inscribed Stock " 1945–1975	107*l.* 5*s.* 2*d.*"

through ademption. The onus is on the next of kin to show it fails for uncertainty as in *In re Gray* (1). It is not a condition precedent to the validity of the gift that the executors should certainly be able to buy the stock. It is possible to value the stock, which has a market outside the United Kingdom. [He referred to *Robinson v. Addison* (2).] The right of the legatee is, therefore, to have either the stock or the value thereof : see the dictum of Kay J. in *In re Gray* (3).

Mulligan for the next of kin. This is a specific legacy and fails through ademption. Even if it is a general legacy it fails for uncertainty. It is no longer possible for the executors to buy this stock. That is what the testatrix directs them to do, and, unless they can do that, the gift fails. Even if it were right to value the stock, it was, at the death of the testatrix, impossible to do so, since the effect of the Acquisition of Securities (No. 5) Order, 1941, and the Securities (Restrictions and Returns) (No. 3) Order, 1941, was to destroy the market by vesting all the stock in the Treasury.

Albery replied.

VAISEY J. The question before me is whether the bequest of " 300*l.* Union of South Africa Stock, 1945–1975 " to the defendant, Elizabeth Bailey, was made inoperative by the fact of this stock (or rather the British holdings of it) having been acquired by the Treasury before the death of the testatrix, or whether the defendant is entitled to the sum received by the executors of the testatrix from the Treasury as the purchase price of her holding of that amount of the stock, or to some other, and if so what, sum of money.

In my view, this must be treated as a general, and not a specific legacy. Therefore, we start with the proposition that this is a general legacy of " 300*l.* Union of South Africa " Stock, 1945–1975." There is, therefore, no question of ademption properly so called. By the Securities (Restrictions & Returns) (No. 3) Order, 1941, it was provided that no person should sell or transfer any of the securities therein mentioned (one of which was the stock in question) except by special permission granted by the Treasury, and that every person resident in the United Kingdom should, before December 1, 1941, make a return to the Treasury of such of

(1) (1887) 36 Ch. D. 205.
(2) (1840) 2 Beav. 515.
(3) 36 Ch. D. 211, 213.

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the said securities as were in his possession. The Requisition of Securities (No. 5) Order, 1941, purported to transfer the securities to the Treasury at the price (in the case of the stock now in question) of 107*l.* 5*s.* for each 100*l.* of stock. Both these orders were dated October 10, 1941, and on the same day the Treasury issued a circular which directed that transfers should be executed by each holder into the joint names of certain officials of the Bank of England before December 1, 1941. The testatrix died on December 2, 1941, and, in accordance with the orders which I have mentioned, all the British holdings of this South African Stock should before that date have been transferred to the Treasury, including the 300*l.* of such stock which the testatrix herself happened to possess.

What then was the position at the date of the death ? The fact that the testatrix, owing to illness, had, at the time of her death, made no return and executed no transfer, cannot, in my judgment, affect the position. Normally, the effect of a general legacy of a sum of particular stock amounts to a direction to the executors either to buy such stock for the legatee or to pay him the value thereof : see *In re Gray* (1) where Kay J. said : " A general legacy of this kind amounts " in effect to a direction to the testator's executors to buy " the shares or other property designated . . . . Of course " the court will do its utmost to maintain the legacy, and " if for any reason the shares could not be bought, or if the " legatee had a choice in the matter, and said that " he would rather not have shares, he would then take " the amount of money which would have had to be expended " in buying them . . . ." It is here suggested that, having regard to the prohibition against dealing in the stock and the impossibility of purchasing it, the gift fails for uncertainty, because, it is said, there was and is no means of ascertaining the true value of the bequest.

On December 2, 1941, the testatrix could not, and at no time subsequently could her executors, have bought the stock in the open market. True it is, that she had some of it in her possession, but this really belonged to the Treasury subject to the payment to her or her estate of the amount of purchase money prescribed by the order. Ought I to say that the gift fails, notwithstanding that the stock still existed and was in fact (as regards the British holdings of it) in process of being

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(1) 36 Ch. D. 205, 211.

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exchanged for 107*l.* 5*s.* per 100*l.* on the compulsory acquisition of such holdings by the Treasury? It seems to me, on the whole, that the legatee is entitled to the sum which the stock would have been worth to any holder of it, and I do not doubt that the Treasury was at all material times prepared to take it over at the indicated price. The stock was not cancelled, though dealings in it were temporarily forbidden. If, as Kay J. said in *In re Gray* (1), "the court will do its utmost to maintain "the legacy," I think that I ought to say that this legacy is, in the events which have happened, equivalent to a legacy of three times 107*l.* 5*s.*, that is to say, 321*l.* 15*s.* This is not really the same case as *In re Gray* (1), nor is it the case, contemplated in Jarman on Wills, 7th ed., p. 1043, of a legacy of shares in a company which cease to exist between the death of a testator and the expiration of a year from such death. I think that the question is a difficult one and not really covered by any of the authorities, but I will declare that the defendant, Elizabeth Bailey, is in respect of her legacy entitled to be paid the sum of 321*l.* 15*s.*

Solicitors: *Godfrey & Robertson, for Robertson & Thomas, Amersham; Haslewood, Hare & Co., for Francis & How, Chesham, Bucks.*

(1) 36 Ch. D. 205, 211.

H. L. L.

UTHWATT J.

1944

Jan. 12; *Feb.* 2.

In re GOTT.

GLAZEBROOK *v.* UNIVERSITY OF LEEDS.

Charity—Charitable bequest—Validity—Legacy to found university scholarship—"Male students of British and Christian parentage"—Uncertainty—Specific charitable intention—Need of exact definition.

A testatrix bequeathed a legacy of 3,000*l.* to found a scholarship at a university, open to "male students of British and Christian "parentage." The validity of the gift was questioned on the ground of the uncertainty of the class of students eligible:—

Held, that, assuming the definition of the class of students eligible to be uncertain, there was a definite charitable intention shown for a class not exactly defined and the bequest created a valid charitable trust.

A charitable trust cannot fail for uncertainty whether the charitable intention be general or only specific. There is no practical reason why certainty of the exact ambit of a charitable purpose should be required, as the court can settle a scheme for its administration.

A.-G. v. *Syderfen* (1683) 1 Vern. 224 and *Morice* v. *Bishop of Durham* (1805) 10 Ves. 522 applied.

ADJOURNED summons.

By her will made in 1941 the testatrix, Mrs. Beryl Katherine Gott, made the following bequest : " I bequeath to the council " of the University of Leeds (free of duty) the sum of 3,000*l* " upon trust that the same shall be invested in any investments " for the time being sanctioned by law for the investment of " trust funds and the income thereof utilized for the creation " of a scholarship in connexion with the said university, to " be called the 'Frank Gott Scholarship,' which shall be " constituted on such scheme or schemes as shall from time " to time be formulated by the said council of the said " university and shall be for the benefit of any one or more " male students of British and Christian parentage who shall " have graduated in honours in one or more of the schools of " a university situated in Great Britain or Northern Ireland " or in one of the colonies or dominions of Great Britain and " who shall desire to commence or shall have commenced some " form of post-graduate study at the University of Leeds such " scholarship or scholarships to be created for such objects and " purposes and be tenable for such periods as the said council " shall in its uncontrolled discretion determine."

A question having arisen as to the validity of the bequest, the executors of the will took out this summons to have determined the questions whether the legacy failed for uncertainty or for any other reason, or whether it could not be carried into effect by reason of the impossibility of ascertaining exactly the qualification of the candidates.

Geoffrey Cross for the executors.

Pascoe Hayward for the University of Leeds. This is a valid charitable gift. The university would welcome the gift, provided they are not required to impose any religious tests on candidates, a procedure which would be contrary to their charter. The trust would be administered by a separate set of trustees.

Danckwerts for the Attorney-General. This is a valid charitable gift, and, therefore, cannot fail for uncertainty due to any doubt as to exactly what the testatrix meant by "of Christian parentage." The decision in *Clayton* v. *Ramsden* (1) has no application to charities, but dealt with a condition of forfeiture on marriage to a person not "of the "Jewish faith," a condition which must be strictly construed.

Winterbotham for the executors of the residuary legatee. The rule that a charitable trust cannot fail for uncertainty only applies where a general charitable intention is shown, and here there is none. If the intentions of the testator cannot be carried out, the gift fails : *In re Wilson*, per Parker J. (2). There cannot be a valid charitable gift if the court is unable to construe the trust, and cannot say exactly what the testatrix meant by "of Christian and British parentage." Both "Christian" and "parentage" are too uncertain. "Parentage" might apply to both parents or to only one parent. Again, the further question arises, at what time is the qualification to be ascertained—at the time when the student enters for the scholarship, or at his birth : *Clayton* v. *Ramsden* (1). The gift fails for uncertainty.

Danckwerts, in reply, referred to *Morice* v. *Bishop of Durham* (3) ; *In re Lopes* (4) ; Tudor on Charities, 5th ed., pp. 26, 33, 42.

Cur. adv. vult.

Feb. 2. UTHWATT J. read a judgment, in which, after stating the facts, he said : Objection based on uncertainty is taken to the validity of the bequest. It is said, first, that, as a matter of construction of the will, the words "of British "and Christian parentage" are vague and that no certain meaning can be attached to them, with the result that the class of student expressed by the testatrix to be eligible for the scholarships cannot be exactly defined. It is next argued—again as a matter of construction—that no general charitable intent extending beyond students with the permitted qualification is shown in the will, and that the gift is, therefore, for a particular charitable purpose not defined with certainty. It is then stated to be a proposition of law that where property is given only for a particular charitable purpose, the gift fails unless that purpose is defined with certainty. If these three propositions are accepted the gift fails.

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(1) [1943] A. C. 320.

(2) [1913] 1 Ch. 314, 321.

(3) (1804) 9 Ves. 399 ; (1805) 10 Ves. 522.

(4) [1931] 2 Ch. 130.

On the first point stress was mainly laid in argument on the word " Christian," and reliance was placed on the decision in the House of Lords in *Clayton* v. *Ramsden* (1), and the dicta contained in the speeches in that case of Lord Russell of Killowen and Lord Romer as to the uncertainty of the meaning to be attributed to the words " of the Jewish faith " which there appeared in a condition of defeasance. Counsel for the Attorney-General was content for the purposes of argument to concede the first point of construction, and I do not propose to decide whether the words " of British and Christian " parentage," when used in this will to define the qualification demanded of students as a condition of eligibility for a scholarship at a university in Great Britain, are or are not uncertain in their meaning. I propose to assume that they are uncertain, only observing that in *Att.-Gen.* v. *Drummond* (2), Lord St. Leonards found himself able to give, for the purposes of construing a charitable trust created by deed in 1710, the meaning borne by the word " Christian " at the date of the execution of the deed. It is sufficient to state that the validity of the trust as a charitable trust in no way depends on the acceptance of any particular one of the several meanings of which the phrase in question is assumed to be capable.

On the second point, I take the view that the substance of the gift is not a trust for post-graduate education generally, but is for the post-graduate education of students possessing the prescribed qualification of parentage and training. The statement as to the class from which scholars are to be drawn is not, therefore, to be treated as a mode for carrying into effect a charitable intent in favour of post-graduate education. The questions whether post-graduate study at the University of Leeds or administration of the trust by the council of that university also form part of the substance of the trust or merely define a mode for carrying it into effect are not here relevant and I express no opinion on them. I, therefore, accept Mr. Winterbotham's contention on the second point and (disregarding for the purpose a question of construction with which I deal later) treat the trust as a trust for the benefit of a class not exactly defined in the will.

I turn now to the proposition of law. The argument is

(1) [1943] A. C. 320.

(2) (1842) 1 Dr. & War. 353.

that where there is shown an intention to devote property to a particular charitable purpose only, but it is impossible to ascertain that purpose with certainty, the trust intended is not known, and there is, therefore, no trust to be enforced. The well-known statement that "a charitable trust does not "fail for uncertainty" is said to be a slogan which does not apply save where there is an intent in favour of charity generally. No doubt, when a purpose is stated, no charitable trust is created unless the purpose is certainly charitable, but, given that certainty, uncertainty as to the particular charitable purpose intended is, in my opinion, immaterial. No authority was cited to me which supports the proposition that certainty in the definition of an intended specific charitable purpose is necessary and the proposition appears to be wrong in principle and never to have been accepted in practice. If a gift to charity generally does not fail for uncertainty—and that is a proposition which is not open to dispute—it appears to me to be a natural consequence, though it may not be a necessary consequence, that a specific charitable purpose may be vaguely set out. There is no practical reason why certainty of the exact ambit of a particular charitable purpose should be required, for the court has, as regards all charitable trusts, jurisdiction to settle a scheme for their administration—I am not referring to cy pres schemes—and it is settled practice that these schemes may deal, not only with methods of administration, but also with, and define, the substance of the trust. The court, as Lord Eldon pointed out, in *Morice* v. *Bishop of Durham* (1), has taken strong liberties on the subject of charities. The liberties taken are embodied in definite principles, one of which is that a trust for charitable purposes does not fail for uncertainty and another the assertion of the jurisdiction to give effect to the drift of the ideas embodied in the expression of a gift made on trust for a charitable purpose.

I propose to refer only to three cases. The first case is *Att.-Gen.* v. *Syderfen* (2). In that case the gift was to be applied to such charitable uses "as I have by writing under "my hand formerly directed," and no such directions were found. The gift was decreed to be a good gift to charity to which, in the circumstances, effect should be given as a gift for charitable purposes generally, and, in regard that by the decree, the court was compelling the application to one charity of property which might in truth appertain to some other

(1) 10 Ves. 522, 538.

(2) 1 Vern. 224.

charity, the court provided that the executor should be indemnified against the writing referred to in the will in case it should thereafter be found. Specific charitable purposes were obviously intended but were not known at all. An inference of a general charitable intent was drawn, and it would be impossible to draw such an inference from a trust inherently void for uncertainty. A charitable purpose about which something is known can surely be in no worse position in respect of its validity than one about which nothing is known. That case was approved in *Mills* v. *Farmer* (1), and the principle involved in it is part of the law of England, although I gather that this principle has not been accepted in the law of the United States of America : (see Restatement of the Law of Trusts, Vol. II., s. 395).

The next case to which I propose to refer is *Morice* v. *Bishop of Durham* (2), and I refer to it only to cite a passage from the judgment of Sir W. Grant M.R., in which he states the principle. The passage is as follows : " The only " question is, whether the trust "—with which he was dealing which was a trust—" for such objects of benevolence and " liberality as the trustee in his own discretion shall most " approve "—" upon which the residue of the personal estate " is bequeathed, be a trust for charitable purposes. That it is " upon some trust, and not for the personal benefit of the " bishop is clear from the words of the will ; and is admitted " by his Lordship ; who expressly disclaims any beneficial " interest." (See *Gibbs* v. *Rumsey* (3).) " That it is a trust, " unless it be of a charitable nature, too indefinite to be " executed by this court, has not been, and cannot be, denied. " There can be no trust, over the exercise of which this court " will not assume a control ; for an uncontrolable power of " disposition would be ownership, and not trust. If there be " a clear trust, but for uncertain objects, the property, that " is the subject of the trust, is undisposed of, and the benefit " of such trust must result to those, to whom the law gives " the ownership in default of disposition by the former owner. " But this doctrine does not hold good with regard to trusts " for charity. Every other trust must have a definite object. " There must be somebody in whose favour the court can " decree performance. But it is now settled, upon authority, " which it is too late to controvert, that, where a charitable

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(1) (1815) 1 Mer. 55, 95.

(2) 9 Ves. 399, 404, 405.

(3) (1813) 2 Ves. & B. 294, 298.

"purpose is expressed, however general, the bequest shall not "fail on account of the uncertainty of the object; but the "particular mode of application will be directed by the King "in some cases, in others by this court."

The last case to which I will refer is *In re Delmar Charitable Trust* (1), a decision of Stirling J., and I cite it as an application of the principle. In that case a testator gave to trustees a fund to be called the "D. charitable trust," and directed the trustees to pay one-tenth of the income thereof to the P. A. Society, "or some one or more kindred institutions," having certain specified objects, and to divide the remainder of the income between such of the charitable institutions in London or the neighbourhood as they might select, and in such proportions as they might deem fit. It was held that the gift of the one-tenth was alternative and not substitutional; that it was a good charitable gift to one or more institutions of which the society named was a type; that the trustees had no discretion as to what institutions were to benefit under the gift of the one-tenth; and a scheme was directed to be settled. The contention put forward by the residuary legatees was that the gift was void for uncertainty and that was the way in which the judge dealt with the matter. He says (2): "It "seems to me that the object which he intended to benefit "was either the Protestant Alliance or some one or more "kindred institutions. He selects the Protestant Alliance as "the type of institution which he meant to benefit; but "I do not think that he meant the benefit to be exclusively "confined to it. So understood, the gift is a perfectly good "charitable gift, and I have not to face the difficulties which "would arise if the gift were in favour of a private individual— "difficulties which are so fully and learnedly considered in "the judgment given by the Lord Chancellor in the case to "which I have referred. It seems to me that this must be "dealt with upon the ordinary footing of a charitable bequest." The gift in this case was specific in its purpose, and in the absence of a power of selection vested in the trustees was as uncertain in its objects as any gift could be, but nevertheless, being charitable, it was held to be good. In my opinion, therefore, apart from any question which may arise if the council of the university decide not to accept the gift, the gift is a good charitable bequest.

I have rested my decision on a broad principle, but the same

(1) [1897] 2 Ch. 163.

(2) Ibid 167.

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1944

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result may be arrived at on a narrow ground. The bequest has in immediate contemplation application of the income of the endowment in accordance with a scheme to be settled by the council of the university and a test of the eligibility of students could be properly inserted in any scheme. A test dealing with the parentage of students might assume many forms, and the question of the form of the test is left to the council to decide acting on such material as they find in the will. As a matter of construction of the bequest it is not necessary that any definite test should be such as to embrace all male students possessing the prescribed qualifications. Just as the council might, if so advised, in the scheme they are authorized to make limit the class of eligible candidates by reference to forms of post-graduate study which appealed to them, so in their scheme they might frame a test of parentage which confined the class of eligible candidates to persons certainly within its ambit, and in framing that test properly take into account any matter which they conceived to affect the University of Leeds. Put generally, the bequest itself contains practicable machinery for getting rid of the supposed vice of uncertainty. I need hardly add—though this is irrelevant on this point of law—that if the council feel difficulties in settling a test of parentage conforming with the provisions of the will, the advice or the directions of the court can always be obtained.

Solicitors: *Patersons, Snow & Co., for Dibb, Lupton & Co., Leeds, and for North & Sons, Leeds; Maxwell, Batley & Co., for Simpson, Curtis & Burrill, Leeds; Treasury Solicitor.*

H. L. L.

SIMONDS J.

1944

Jan. 25; *Feb.* 3.

In re FUCHS.

WESTMINSTER BANK, LIMITED *v.* CHEW.

Revenue—Estate duty—Incidence—Executor of deceased not accountable for estate duty—Reversion under settlement falling into testator's estate—Duty on cesser of widow's life interest—Whether chargeable rateably on residue of estate and pecuniary legacies—" Every person " to whom any property so passes for any beneficial interest "—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 8, *sub-s.* 4.

By a post-nuptial settlement made in 1881, D. F. settled property on trust to pay the income to his wife F. M. F. during her life and

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FUCHS, *In re.* WESTMINSTER BANK, LD. *v.* CHEW.

subject thereto, in the events which happened, for himself absolutely. By his will, made in 1894, D. F. directed that in the event of his leaving no child or issue living at his death, his trustees were to hold his residuary estate on the trusts of the settlement of 1881 so long as his wife should remain a widow, and after her second marriage or death and subject to her life interest in the funds originally settled, to pay thereout ten legacies, and to hold the residue for the benefit of the residuary legatees therein named. D. F. died, without issue, in 1894, but F. M. F. survived until 1940, when she died without having remarried, and estate duty became exigible, and was duly paid in respect of the funds originally settled in 1881. A question having been raised as to the incidence of the duty, as between pecuniary and residuary legatees :—

Held, that the duty was not apportionable, but must be wholly borne by the residuary legatees. The nominal beneficiary liable to pay the duty under Finance Act, 1894, s. 8, sub-s. 4, was the settlor D. F. himself, and the fact that he was dead, and his executors had therefore to pay the duty, made no difference to the parties' rights. The effect of s. 8, sub-s. 4, was then exhausted, and the liability could not be imposed on any derivative title, so as to be apportioned between the beneficiaries under his will.

Berry v. *Gaukroger* [1903] 2 Ch. 116, and *In re Hicklin* [1917] 2 Ch. 278 distinguished.

ADJOURNED summons.

By a post-nuptial settlement, dated April 23, 1881, the testator, Daniel Fuchs, settled certain funds on trust to pay the income to his wife, Florence Mary Fuchs, during her life and subject thereto in the events that happened on trust for himself absolutely. He made his will on June 2, 1894, and thereby directed that in case there should be no child or issue of his living or en ventre sa mere at his death, his trustee should pay the residue of his trust estate to the trustees for the time being of his post-nuptial settlement to be invested and held by them so long as his wife should remain a widow and unmarried on the same investments and trusts. He then declared that the trustees of that settlement should from and after the second marriage or death of his wife and subject to her life estate in the funds originally comprised therein stand possessed of the trust estate and all other funds then subject to the trusts of the settlement on trust to pay, transfer or make over the same to the trustees of his will. He directed the trustees of his will on that event happening to pay certain legacies, ten in all, of a substantial amount and to hold the residue on certain trusts for the benefit of his residuary legatees. The testator died on December 19, 1894, having had no issue. In due course the residue of his trust fund was transferred to the trustees of the post-nuptial settlement and held by them on the trusts therein declared. The widow survived the testator by nearly fifty years and died on March 22, 1940, without having been remarried. Upon her death estate duty became exigible and was duly paid in respect of the funds originally comprised in the post-nuptial settlement.

The testator's trustees took out this summons, which asked (inter alia) whether the estate duty payable on the death of Florence Mary Fuchs ought to be borne by the ten legacies (amounting to 29,000*l.*) and the rest of the residuary trust estate rateably, or wholly by the rest of the residuary trust estate.

Russell Gilbert for the plaintiffs, stated the facts and referred to the Finance Act, 1894, s. 8, sub-s. 4 (1).

C. D. Myles for pecuniary legatees, and
Wilfrid Hunt for charities entitled to legacies.

The estate duty payable is charged wholly on the residuary estate, to the exoneration of the legacies. The present case is distinguishable on the facts from *Berry* v. *Gaukroger* (2) and *In re Hicklin* (3), in which legacies had to bear a rateable proportion. The testator owned a reversion, subject to his wife's life interest, and the fact that he settled the reversion by his will makes no difference to the parties rights. The liability for duty falls on the reversion, and does not affect the beneficiaries under the will, who are not the beneficiaries of the reversion. If the testatrix's wife had predeceased him, the estate duty would have been payable before the testator's death, and he would have become entitled to the reversion less the duty. It only became part of his estate as an asset already subject to duty. If it had been sold, the duty would have fallen on the purchaser. The case does not come within the Finance Act, 1894, s. 8, sub-s. 4, in such a way as to cover this claim to apportionment of the liability. The reversion is something quite outside the testator's estate, dependent as it is not on his will, but on a prior disposition. It is admitted that no part of the estate duty which became payable on the testator's death was payable by the pecuniary legatees; and that being so, there is no reason why they should pay any duty levied on his wife's death. The language of s. 8, sub-s. 4, of the Finance Act, 1894, is no doubt very wide, but not wide enough to cover this claim.

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(1) By the Finance Act, 1894, s. 8, sub-s. 4: Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property . . . .

(2) [1903] 2 Ch. 116.

(3) [1917] 2 Ch. 278.

A. C. Nesbitt for the residuary legatee. On the facts this case comes within the language of s. 8, sub-s. 4, and the decision in *Berry* v. *Gaukroger* (1). The property settled in 1881 comes into the hands of the trustees of the will, and the derivative title passes to the legatees who are accountable for the duty, which should be borne rateably by pecuniary and residuary legatees. *In re Hicklin* (2) the estimated value of the reversion might affect the rate of duty. The fact that the legacies only became payable on the death of the widow does not affect the width of the language of the section. The question turns on the construction of the statute, not on that of the will. The reversion might have been sold, but the only fund for the payment of the legacies would have included the proceeds of such sale.

Hunt replied.

Cur. adv. vult.

Feb. 3. SIMONDS J. read the following judgment (after stating the facts). The question which I now have to determine is whether the estate duty which became payable in respect of the settled fund on the widow's death is to be borne by the ten legacies and the residue of the testator's estate rateably or is to be borne wholly by the residue of the testator's estate. It is an accident which can be ignored for the purpose of answering this question that the fund set free by the death of the widow and now available for distribution in due course

(1) [1903] 2 Ch. 116. (2) [1917] 2 Ch. 278.

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FUCHS, *In re.* WESTMINSTER BANK, LD. *v.* CHEW.

of administration comprises not only the settled fund, a reversion in which was at all times an asset of the estate, but also the residue of the free estate. The questions would be the same if the only asset in the estate had been the reversion. This asset could have been sold before it fell into possession if the circumstances of the estate required it. If it had been so sold no question of the incidence of duty as between pecuniary legatees and residuary legatees could have arisen. Estate duty would have been payable on the death of the widow but the only effect of this so far as concerns the testator's estate is that the purchaser would have paid so much less for the reversion knowing that what he in due course received would be reduced by the amount of duty exigible. It could not in such circumstances be contended that as between pecuniary legatees and residuary legatees any equity existed in favour of the latter which would enable them to throw any part of the assumed reduction of the trust money on the former so as to reduce the amount of the legacies. If instead of realizing the reversion the executors await its falling into possession the position is no different. In due course they receive the trust fund less any duty and less also any costs, charges or expenses which have been properly deducted and what they receive is available like any other asset for distribution in due course of administration. I see no ground for saying that in this case there is any equity in favour of the residuary legatees which entitles them to throw any part of the duty upon the pecuniary legatees.

It was, however, contended that apart from any equity an apportionment of the duty rateably between the two classes of legatees is prescribed by statute. This contention rests on s. 8, sub-s. 4, of the Finance Act, 1894, and on two authorities in particular, *Berry* v. *Gaukroger* (1) and *In re Hicklin* (2). It was admitted that though in the fifty years which have passed since the Finance Act, 1894, there must have been many cases in which a reversion has fallen in, duty has been paid on the death of the tenant for life and the proceeds have been distributable to pecuniary and residuary legatees and, therefore, such a claim might have been advanced, yet there is no trace in the books that it ever has been advanced. In my judgment, a sufficient reason for this is that the contention though specious is quite unarguable. Section 8, sub-s. 4, of the Finance Act, 1894, is not easy to

(2) [1903] 2 Ch. 116.

(2) [1917] 2 Ch. 278.

construe, but it cannot, I think, have any further application when, duty having been paid, the fund on which it has been paid passes to a beneficiary absolutely. It appears to me to make no difference whether the nominal beneficiary is alive and himself receives the fund or is dead and the fund is received by his executors or administrators. In the former case the nominal beneficiary and in the latter his executors or administrators are the persons to whom "the property "passes" for a "beneficial interest in possession" within the meaning of the sub-section. If, the former having died, the latter receive the fund, they are liable to pay the duty if it has not been paid. At that stage the effect of the sub-section is exhausted and there is, in my judgment, no justification for carrying the matter any further and apportioning the duty as between those who claim under or through the beneficiary. If this were not so it is difficult to see why creditors of his estate who might be paid out of the proceeds of the reversion should not also bear their share of the duty. The view which I take of the scope of the sub-section is supported by the observations of Sargant L.J. in *In re Drake* (1).

The same result is reached by an approach from a somewhat different angle. The sub-section contemplates the passing of property from A. to B. upon the death of A. under circumstances in which the executor of A. is not liable for duty. Where under a disposition made by C. a trust fund becomes distributable on the death of the life tenant A. to the reversioner B. it is sufficiently accurate to say that the property in the trust fund passes to B. and if B. represents more than one person then the several reversioners will bear the duty rateably. But where the reversioner B. dies before the reversion falls in and it, when it does fall in, is distributable under his will or (it may be) on his intestacy, it is, in my judgment, too great a strain even of popular language, in which admittedly the Finance Act is couched, to say that the property, that is the trust fund, passes from A., the tenant for life, to the persons who take either under B.'s disposition or in default of such disposition. The right of such a person is not a right in or to any property but solely a right to have the estate of the reversioner including this asset administered in due course. On this footing the primary condition of the application of the sub-section is not present and it is in this respect that the cases of *Berry* v. *Gaukroger* (2) and *In re Hicklin* (3) on which counsel

(1) [1926] Ch. 559, 573. (2) [1903] 2 Ch. 116. (3) [1917] 2 Ch. 278.

for the residuary legatees relied, are to be distinguished. In both cases the deceased on whose death duty was exigible and the persons who disputed their rateable liability claimed under the same disposition and it could be fairly predicated of them that the same property which the deceased enjoyed during his life passed to them after his death according to their respective interests. They were accordingly liable for a rateable part of the duty. Mutatis mutandis the same observation can be made of numerous cases in which the principle of *Berry* v. *Gaukroger* (1) has been held to be applicable. But as I have already pointed out, it is just this element which is absent from such a case as the present one where the contest is between several beneficiaries who claim not under the original disposition but under a testator who was himself absolutely entitled in reversion under that disposition. In my judgment, there is no room for the application of the principle and I declare that no part of the duty payable on Mrs. Fuchs' death in respect of the settled fund is to be apportioned to the pecuniary legatees in exoneration of the residue of the testator's estate.

Solicitors: *M. M. Blyth, for Dudley M. Paul & Co., Liphook ; Hanbury, Whitting & Ingle ; Armitage, Chapple & Co.*

(1) [1903] 2 Ch. 116.

H. L. L.

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In re OSMUND.

MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED *v.* ATTORNEY-GENERAL.

Charity—Charitable bequest—Gift to trustees " in their absolute discretion " to apply the same to the medical profession for the furtherance of " psychological healing in accordance with the teaching of Jesus " Christ."

A testatrix gave all her real and personal estate to trustees upon trust " in their absolute discretion to apply the same to the " medical profession for the furtherance of psychological healing " in accordance with the teaching of Jesus Christ " :—

Held, that the gift constituted a valid charitable trust, it being intended, on its true construction, to further the art of healing in the way specified.

Decision of Bennett J. (ante p. 66) reversed.

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OSMUND, *In re.* MIDLAND BANK EXECUTOR AND TRUSTEE CO., LD. *v.* ATTORNEY-GENERAL.

APPEAL from Bennett J. (1).

By her will, dated August 1, 1942, the testatrix, Myrtle Irene Osmund, after appointing the plaintiffs (there referred to as the company) to be executors and trustees thereof, continued: "I give devise and bequeath all my real and "personal estate to the company upon trust in their absolute "discretion to apply the same to the medical profession for the "furtherance of psychological healing in accordance with the "teaching of Jesus Christ." The testatrix died on September 27, 1942, and probate of the will was granted to the plaintiffs. A summons was taken out by the plaintiffs asking to have it determined whether this gift was a valid and effectual charitable trust or whether it failed for remoteness, uncertainty, or any other cause, and asking that, if the gift created a valid and effectual charitable trust, a scheme might be directed. By an affidavit, dated October 21, 1943, Dr. Hinds-Howell said that psychological healing was well-known and recognized in the medical profession and was embraced in the practice of psycho-therapy. Psycho-therapy in essentials entailed the discovery of the mental factors causing physical or mental distress or nervous and emotional disorders, thus helping individuals to restore themselves without resort to surgical treatment. There were many doctors in this country and hospitals and clinics that specialized in the application of medico-psychological treatment or psycho-therapy. In his opinion, Christ's instructions to his disciples to heal the sick would definitely cover the psychological form of healing. Bennett J. held, on the authority of *Houston* v. *Burns* (2), that the gift failed unless it were for charitable purposes, because a testator could not leave it to another person to dispose of his property for him unless he had passed the beneficial interest to that person to deal with as his own; that the gift was not for charitable purposes as defined in *Special Commissioners of Income Tax* v. *Pemsel* (3); and that it was, therefore, invalid. The Attorney-General appealed.

Sir David Maxwell Fyfe S.-G. and *Danckwerts* for the Attorney-General. The gift in the will creates a valid charitable trust. It is for the furtherance of the art of healing in a particular way well recognized in the medical profession. It is not within the object of the trust, as Bennett J. held, to

(1) Ante, p. 66.

(2) [1918] A. C. 337.

(3) [1891] A. C., 531, 583.

provide for the healing of particular persons except in so far as the actual practice of healing is necessary for the furtherance of the art of healing. Here the application is to be to the medical profession for the furtherance of psychological healing, and this shows that what is contemplated is the advancement of the art of healing in the way specified. It is well settled that a trust which is partly for charitable and partly for non-charitable purposes is void, but that is not the case here. The testatrix inserted the limitation that the psychological healing must be " in accordance with the teaching of Jesus Christ," but the only teaching that seems appropriate is " heal the " sick." [They were stopped.]

Winterbotham for the next of kin. It must be shown, not merely that there is a charitable purpose, but also that all non-charitable purposes are excluded. There is ample authority to show that no non-charitable purposes must be included if what otherwise would be a good charitable trust is to be valid. Here the testatrix was seeking to promote psychological healing " in accordance with the teaching of Jesus Christ," but there is no such thing. There are no words limiting the trust to advancing the art of psychological healing. The trust is to apply the trust fund at the discretion of the plaintiffs " to " the medical profession." That means, to all persons medically qualified and not an educational body. The testatrix was wishing to assist in healing and not in improving healing. There is no valid charitable trust.

Lord Greene M.R. The question which we have to decide is whether or not this is a valid charitable gift. Bennett J. held that it was not. It is not open to dispute that where the language of a gift, on its true construction, makes it possible for the subject-matter of the gift to be applied for non-charitable purposes, that gift is not a good charitable gift even although the greater part of the purposes may be truly charitable. It is sufficient to destroy the charitable nature of the gift if, on its true construction, it is possible for those administering the property to go outside the scope of charity. The sole question is whether the language used by the testatrix brings the gift within that rule. It is not, and, indeed, it cannot, be disputed that medical education is a good subject-matter of charity, nor can it be disputed that medical research and the general improvement of the medical art is

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a good subject of charity. We are concerned here with a particular recognized branch of the medical art, namely, psychological healing. The testatrix has, however, put a qualification on that, because it must be "in accordance with "the teaching of Jesus Christ." That I read as meaning no more than that the psychological healing in which she is interested is to be limited to healing of that character which is in conformity with the teaching of Jesus Christ. It puts a limit on the psychological healing which is permissible, but it does not destroy the charitable quality of the gift if charitable it be, nor does it render the gift bad for uncertainty. That, indeed, was not suggested in argument.

Bennett J. held that the gift offended against the rule which I have mentioned on the ground that it would be open to the trustees—to take the extreme case which he took—to pay a doctor to cure by means of psychological healing some extremely wealthy man who was suffering from chronic dyspepsia. That example, however, does not fall within the language of the phrase "for the furtherance of psychological "healing." The words are not "for the provision of psycho-"logical treatment," and the example which the learned judge took would be an example of the provision of such treatment. If, of course, the words comprised the mere provision of treatment, the argument would be a valid one, but I cannot construe them as having such a wide meaning. The true meaning of the words is "for the furtherance of the art of "psychological healing" and any application of the funds which stepped outside the bounds of that phrase would be contrary to the trust created by this testatrix.

It is true that the art of psychological healing may be furthered by the care and treatment of some individual case. There may be a very unusual case which it is desirable to study in the interests of the medical art. The mere fact that an individual benefits from the treatment he receives does not mean that the study of the disease which is undertaken in the course of treating him is outside a charitable purpose. One of the principal ways in which diseases can be studied and the art of healing furthered is by the treatment, study and recording of individual cases, and it is irrelevant that the patients may benefit. On the other hand, if the trustees, for instance, provided a sum of money with the object of curing one individual without any reference to the furtherance of the art of healing in general, that would be a breach of trust.

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I find some confirmation for this view, if it be needed, in the fact that the trustees are "to apply the same to the medical "profession." That surely means something different from supplying the money to medical practitioners as in the example which Bennett J. took. I read that reference to the medical profession as confirming the idea that the profession as a whole, or some body in the profession, is regarded by the testatrix as the persons who will undertake the application of the money for the furtherance of the art of psychological healing. That seems to be a much more sensible meaning to give to those words, because to construe them as including the hiring of individual practitioners to treat individual cases would be to impose on the plaintiff company a type of activity which it is not likely that the testatrix would have entrusted to them. On the other hand, if she contemplated them as making the money available to the profession as a body, or through bodies and associations in the profession, a sensible meaning is given to the provision. The main reason for the view I take lies in what appears to me to be the true meaning in the English language of the words "the furtherance of "psychological healing." In the result, therefore, the appeal must be allowed and an appropriate declaration made.

MACKINNON L.J.: I agree.

LUXMOORE L.J.: I also agree.

Appeal allowed.

Solicitors: *Treasury Solicitor; Herbert Smith & Co.; Ridsdale & Son for W. H. Heelis & Son, Ambleside.*

H. C. G.

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Feb. 3, 4.

In re WHITBY.

PUBLIC TRUSTEE *v.* WHITBY.

Will—Bequest—"Jewellery"—Unmounted diamonds—Articles "now "deposited for safe custody"—"Now"—Inclusion of articles deposited after date of disposition—Wills Act, 1837 (7 *Wm.* 4 *&* 1 *Vict., c.* 26), *s.* 24—*Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23.), *s.* 55, *sub-s.* 1 (*x.*).

A testator, by a first codicil, dated January 25, 1939, made a bequest to E. R. of "all the residue of my personal chattels as

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" defined by s. 55, sub-s. 1 (x.), of the Administration of Estates " Act, 1925." By a fourth codicil, dated June 13, 1940, he excluded from this bequest " all articles of jewellery and other chattels and " effects . . . . which are now deposited for safe custody " at a named safe deposit :—

Held, (1.) that the word " jewellery " in the definition of " personal chattels " in the Act of 1925 included cut, but unmounted, diamonds belonging to the testator ; and (2.) that the chattels excluded from the gift in the first codicil were those deposited at the safe deposit at the date of the fourth codicil and not those deposited there at the date of the testator's death (certain additions having been made after June 13, 1940), the words used being sufficient to show a " contrary intention " within the meaning of s. 24 of the Wills Act.

APPEAL from Uthwatt J.

The testator, William Henry Whitby, having made his will, dated May 15, 1925, in which he appointed the Public Trustee to be his sole executor and trustee, made the following bequest by his first codicil, dated January 25, 1939 : " All the residue " of my personal chattels as defined by s. 55, sub-s. 1 (x.), of the Administration of Estates Act, 1925, ... to my said " niece Ethel Rudd . . . ." By a fourth codicil, dated June 13, 1940, the testator excluded from this bequest " all articles of " jewellery and other chattels and effects belonging to me " and which are now deposited for safe custody at the " Manchester Safe Deposit Co.," and he bequeathed these excluded articles to his trustee to be held as part of his residuary estate. The testator died on January 10, 1942, and was at his death possessed of a number of cut, but unmounted, diamonds. At the date of his death, also, there were articles deposited at the Manchester safe deposit which he had bought since June 13, 1940. The Public Trustee took out this summons to ascertain (1.) whether the unmounted diamonds passed in the bequest of personal chattels " as " defined by s. 55, sub-s. 1 (x.), of the Administration of " Estates Act, 1925 "; and (2.) whether under the provision in the fourth codicil the articles excluded from the bequest in the first codicil were those deposited at the safe deposit at the date of the fourth codicil or those deposited there at the date of the testator's death. Uthwatt J. held (1.) that the word " jewellery " in the definition of personal chattels did not include the unmounted stones ; and (2.) that, in view of s. 24 of the Wills Act, 1837, it was the articles deposited at the Manchester safe deposit at the date of the testator's

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death that were excluded from the gift of personal chattels in the first codicil, and became part of the residuary estate, the use of the word "now" being insufficient to show a "contrary intention," within the meaning of s. 24. Ethel Rudd appealed, and the two points were separately dealt with, the first being whether the unmounted diamonds were "personal chattels" as defined by s. 55, sub-s. 1 (x.), of the Administration of Estates Act, 1925 (1).

Harold Lightman for Ethel Rudd. The word "jewellery" in the definition of personal chattels applies to the testator's unmounted diamonds. Jewellery as defined in the Oxford dictionary includes "jeweller's work; gems or ornaments "made or sold by jewellers; jewels collectively or as a form of "adornment." Uthwatt J. found no reason to include unmounted stones, but the definition in the dictionary suggests the contrary. There was no argument in the court below with regard to the words "articles of . . . . personal . . . . "ornament" in sub-s. 1 (x.), but, even if the unmounted diamonds were not jewellery, they clearly came within these words.

Wilfrid Hunt for persons interested in residue. "Jewellery" means something made up to wear as an ornament. It does not include unmounted diamonds which are kept in a safe and are incapable of being worn. It was not argued in the court below whether they were "articles of personal ornament," but for the same reason that they are not jewellery, they are not articles of personal ornament. It is of the essence of jewellery that it should be made up to wear. There is the difference between jewellery and jewels.

H. A. Rose for the Public Trustee.

Lord Greene M.R. The first question arriving on this appeal is whether cut, but unmounted, diamonds fall within the word "jewellery," or, if they do not, whether they fall within the words "articles of personal ornament." Uthwatt J. held that they were not jewellery, but the question whether they were "articles of personal ornament" was not argued before him. The definition of "jewellery" in the shorter Oxford dictionary—and for present purposes the definition in the larger dictionary is the same—is as follows: "Jeweller's "work, gems or ornaments made or sold by jewellers; jewels "collectively or as a form of adornment." From that definition it seems to me clear that in the ordinary use of English language the word "jewellery" would cover jewels collectively and gems sold by jewellers just as it covers jewels made up into articles of adornment such as a brooch. I cannot see any justification in this case for excluding from the meaning of the word that of jewels collectively or gems sold by jewellers. The word is wide enough to cover those things, and I see no justification for cutting it down. If the contrary view were taken, some curious results might follow, because a man might, as a hobby, collect cut stones and make some of them up into articles of adornment. Would the question what stones passed by a gift of jewellery in his will depend on his having made them up into a brooch or a bracelet? It seems to me that that would be to introduce a quite irrational distinction. That, nevertheless, would be the result which would follow if I were wrong in my view as to the right construction to be placed on this gift. Taking the view I do of the meaning of the word "jewellery" I do not consider it necessary to deal with the question whether these diamonds are "articles of personal ornament." The appeal on this question must be allowed.

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(1) By the Administration of Estates Act, 1925, s. 55, sub-s. 1 (x.): "Personal Chattels" "mean . . . . jewellery, articles "of . . . . personal . . . . orna- "ment . . . ."

MACKINNON L.J. I agree.

LUXMOORE L.J. I also agree.

The second question was whether the "articles of jewellery "and other chattels and effects . . . . which are now deposited "for safe custody at the Manchester Safe Deposit Co." meant articles deposited for safe custody at the date of the fourth codicil or, by virtue of the Wills Act, s. 24 (1), meant those deposited at the date of the testator's death.

(1) Wills Act, 1837, s. 24, provides: "Every will shall be "construed, with reference to the "real estate and personal estate "comprised in it, to speak and "take effect as if it had been "executed immediately before the "death of the testator unless a "contrary intention shall appear "by the will."

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Harold Lightman for Ethel Rudd. The word "now" shows a "contrary intention" to the general provision in s. 24 of the Wills Act. There is here a reference to a point of time, namely, the date of the fourth codicil, but, if the view taken by Uthwatt J. is right, the word "now" is without any effect.

Authorities in which the word appears are on both sides. Here the testator was clearly thinking of what at the time was lodged in the safe deposit.

Wilfrid Hunt for persons interested in residue. The use of the word "now" is not a sufficient indication of a contrary intuition: see *In re Ashburnham* (1), where the words "at "present" were used and *In re Horton* (2); although, of course, it is a question of construction in every case: see also *Wagstaff* v. *Wagstaff* (3). It is true that "now" occurs here in a combined description of time and place, but so did "at present" in *In re Ashburnham* (1). [He also referred to *In re Davies* (4).]

H. A. Rose for the Public Trustee.

LORD GREENE M.R. It is said, and Uthwatt J. so held, that this matter is governed by s. 24 of the Wills Act, 1837. We have to consider whether or not a "contrary intention" appears in this codicil, the result of which will be to confine the articles mentioned to those which were in the safe deposit at the date of the codicil. If no such contrary intention appears, these words of exclusion will cover only those articles which were in the safe deposit at the date of the death.

We have been referred to a number of cases. Speaking for myself, so far from obtaining any assistance from them, I find them calculated to confuse. In them are to be found paraphrases, in some cases, in my judgment, inaccurate, of the language of the section. In other cases, we find language of quite a different character from that which we have to consider here construed in such a way as to exclude a "contrary intention" within the meaning of the section. So be it. Those cases cannot afford any assistance in this case where we have to construe the language of this particular codicil. I prefer to approach the task of deciding whether

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(1) [1912] W. N. 234; 107 L. T. 601.

(2) [1920] 2 Ch. 1.

(3) (1869) L. R. 8 Eq. 229.

(4) [1925] Ch. 642.

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there is a "contrary intention" by reading the section, and examining the precise language of this codicil.

The provision is not a gift pure and simple. It operates as an exclusion from an earlier gift. The exclusion falls into three parts. One is the description of the type of subject-matter; another is its location, namely, the Manchester safe deposit; the third is a reference to the time of such location, namely, "now." I cannot see why, when a testator has defined the objects to which he has referred both by time and by place, we should be forced to strike out from the will the reference to time as being an immaterial part of the description. Reading this simply as a piece of straightforward English I should have thought that the reference to time is just as essential a part of the description as the reference to place. The contrary view involves, in effect, striking out of this codicil the word "now." On Mr. Hunt's argument the effect would have been precisely the same if the word "now" had not been there. However rightly it may have been held in other cases, where "now" appeared in quite different contexts, that the word was not an essential part of the description, the question we have to decide is whether in this codicil and in this context it is an essential part of the description. Speaking for myself I find it impossible to construe these words in any other sense. It seems to me that the testator was thinking of a particular time, namely, the date of his codicil, just as he was thinking of a particular place. In the result, therefore, I am of opinion that s. 24 does not apply, and that this exception is limited to those articles which were deposited in the place mentioned at the date of the fourth codicil.

MACKINNON L.J. I entirely agree. The contrary view seems to me to be quite unarguable.

LUXMOORE L.J. I also agree.

Appeal allowed.

Solicitors: *Fielder, Le Riche & Co., for Biscoe-Smith & Blagg, Portsmouth; Gregory, Rowcliffe & Co., for Bullock, Worthington & Jackson, Manchester; Gregory, Rowcliffe & Co., for Marriott & Co., Manchester.*

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VAISEY J.

1944

Feb. 9, 10, 16.

In re McELLIGOTT.

GRANT *v.* McELLIGOTT.

Will—Construction—Rule in Shelley's Case—Gift of personal estate to testator's wife, " and her heirs for her and their use and benefit " absolutely and for ever "—Effect of words of limitation—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20.), *s.* 131.

A testator, who died in 1941, directed by his will that his residuary estate, which consisted only of personal estate, be given to his wife " and her heirs for her and their use and benefit " absolutely and for ever " :—

Held, that neither the rule in *Shelley's Case* ((1579) 1 Co. Rep. 93 (*b*)) nor s. 131 of the Law of Property Act, 1925, which abolished that rule, had any application to the bequest, and that the widow was entitled to an absolute interest in the residuary estate of the testator.

ADJOURNED summons.

A testator, by his will, dated June 3, 1936, directed that his residuary real and personal estate be given to his wife " and " her heirs for her and their use and benefit absolutely and for " ever." He died on June 19, 1941, leaving no real estate, and the property passing under the residuary gift consisted of savings bonds and a small sum in cash. The widow had one child, a son. A summons was taken out by the administrator of the estate with the will annexed, to determine whether the testator had bequeathed his residuary estate to his widow for her sole and absolute benefit or to her for life and after her death to the person or persons who should be her heir or heirs, as defined by s. 131 of the Law of Property Act, 1925 (1), or how else the bequest was to be construed.

Michael Albery for the administrator.

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(1) By s. 131 of the Law of Property Act, 1925 : " Where by " any instrument coming into " operation after the commencement of this Act an interest in " any property is expressed to be " given to the heir or heirs or " issue of any particular heir or " any class of the heirs or issue " of any person in words which, " but for this section would, " under the rule of law known as " the rule in Shelley's case, have " operated to give to that person " an interest in fee simple or an " entailed interest, such words " shall operate in equity as words " of purchase and not of limitation, and shall be construed " and have effect accordingly, and " in the case of an interest in any " property expressed to be given " to an heir or heirs or any " particular heir or class of heirs, " the same person or persons shall " take as would in the case of " freehold land have answered " that description under the " general law in force before the " commencement of this Act."

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H. A. Rose for the testator's widow. This is a simple question of the construction of the will. A bequest of personal property to a person and his heirs gives him an absolute interest in that property. Section 131 of the Law of Property Act, 1925, is framed to abolish the rule in *Shelley's Case* (1) and refers only to real estate. That rule, which is clearly stated in *Van Grutten* v. *Foxwell* (2), applies only where there is a freehold gift to the ancestor and an additional gift to the heirs. Before the Act of 1925 came into operation, the bequest would have conferred an absolute interest on the widow, and there has been no alteration of the law with regard to such a bequest. [He referred to Theobald on Wills, 9th ed., pp. 298, 390; Halsbury's Laws of England, 2nd ed., vol. 25, p. 228; vol. 27, p. 743; *Powell* v. *Boggis* (3); and *In re Russell* (4).

J. A. Reid for the son. On the true construction of the will this is a gift to the widow and her son as joint tenants. If the court does not take that view, then, having regard to s. 131, a life interest is given to the widow, with an absolute interest in remainder to the person or persons who at her death would be her heir or heirs under the law in force before the Act of 1925 came into operation. Section 130 enacts that an estate tail in personalty can be created. In that case it must attract all the incidents which an estate tail in realty would attract in law. The latter part of s. 131 applies to "any property" and includes personalty. [He referred to *Perrin* v. *Blake* (5); Hargrave's Law Tracts (1787), p. 500; Fearne on Contingent Remainders, 10th ed., vol. 1, p. 77; and Preston on Estates (1820), vol. 1, p. 269.]

Rose replied.

Cur. adv. vult.

Feb. 16. VAISEY J. read the following judgment. The widow claims to be absolutely entitled. The contention put forward on behalf of her son, however, is that she takes a life interest only, with remainder to himself or other the person or persons who at her death would have been her heir or heirs at law under the general law in force before January 1, 1926. The argument in support of that contention rests on s. 131 of the Law of Property Act, 1925, to which the marginal heading is "Abolition of the rule in Shelley's Case." That section provides, so far as material, that where by any instrument coming into operation after the commencement of the Act—and the testator's will is undoubtedly such an instrument—an interest in any property is expressed to be given to the heir or heirs of any person in words which, but for the section itself, would, under the rule in *Shelley's Case* (1), have operated to give to that person an interest in fee simple or an entailed interest, such words are to operate in equity as words of purchase and not of limitation and are to be construed and have effect accordingly. The section goes on to provide that in such a case the heir or heirs is or are to be ascertained according to the old law.

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(1) (1579) 1 Co. Rep. 93 *b*.

(2) [1897] A. C. 658, 662, 667, 684.

(3) (1866) 35 Beav. 535.

(4) (1884) 50 L. T. 253.

(5) (1770) 4 Burr. 2579.

Even if this had been a devise of real estate I am not by any means convinced that the section would have had any application to it, for it seems to me that in a limitation to A. and his heirs no interest is " expressed to be given " to the heirs. Nor, in my judgment, was it ever the case that such a limitation vested the fee in A. under the rule in *Shelley's Case* (1). The rule, as I understand it, dealt with the case of there being two limitations, one a limitation to the ancestor, and then subsequently (usually after intervening limitations) another separate limitation to the ancestor's " heirs." I may refer to the statement of the rule in the case from which it takes its name cited by Lord Macnaghten in his monumental speech in *Van Grutten* v. *Foxwell* (2): " It is a rule in law, when the " ancestor by any gift or conveyance takes an estate of " freehold, and in the same gift or conveyance an estate is " limited either mediately or immediately to his heirs in fee or " in tail, that always in such cases ' the heirs ' are words of " limitation of the estate and not words of purchase." I think it is correct to say that the effect of the rule was that a limitation expressed or implied to A. for life with remainder to his heirs was in law to be regarded as equivalent to a limitation to A. and his heirs, and I think that this last-mentioned form of limitation was apt to vest the fee in A. not under the rule, but independently of it. I do not agree with the contrary view (if such it be), in the passage to which my attention was drawn in Fearne on Contingent Remainders, 10th ed., vol. 1, p. 77; see also Williams and Eastwood on Real Property (1933), pp. 211-216. In my judgment, therefore, no interest is by this will " expressed to be given " to the heir, nor would the

(1) 1 Co. Rep. 93 *b*. (2) [1897] A. C. 658, 667.

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rule in *Shelley's Case* (1) ever at any time or in any circumstances have applied to this gift. Moreover, as there cannot be a fee simple in personal estate, and as there is no question here of any possible "entailed interest," the words cannot, in this case, have operated so as to bring the section into effect: see *Powell* v. *Boggis* (2). The superadded words "for her and "their own use and benefit, etc.," do not, in my view, make any difference or throw any light on the matter. The only other sections of the Act which could possibly have any bearing on the point are ss. 60 and 130. I have considered them, and I need only say that they do not affect the conclusion at which I have arrived.

Apart from the considerations with which I have now dealt, there can, I think, be no room for doubting that a limitation of personal estate to one and his heirs operates to vest in the person named an absolute interest, the words being for that purpose adequate, although inapt: see *Powell* v. *Boggis* (2), and *In re Russell* (3). I, therefore, declare that the relevant clause of the will takes effect according to its true construction as an absolute gift to the widow.

Solicitors: *Andrew, Purves, Sutton & Creery.*

(1) 1 Co. Rep. 93 *b.*
(2) 35 Beav. 535, 541.
(3) 50 L. T. 253.

J. L. D.

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Jan. 31; *Feb.* 1.

Bankruptcy—Property vesting in trustee—Undischarged bankrupt convicted of indictable offence—Order for payment of costs of prosecution out of money in convict's possession—Effect of order—Costs in Criminal Cases Act, 1908 (8 *Edw.* 7, *c.* 15), *s.* 6, *sub-ss.* 1, 5—*Bankruptcy Act,* 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 38, 47.

On the conviction of a prisoner of an indictable offence at assizes, the judge ordered (1.) under s. 1 of the Costs in Criminal Cases Act, 1908, that the local authority should pay the costs of the prosecution, (2.) under s. 6, sub-ss. 1 and 5, that the prisoner should pay the local authority 2,500*l.* towards those costs, and that a sum of 1,581*l.* in the hands of the police out of money taken from the prisoner on his apprehension should be handed to the local authority in part satisfaction. At the time of his conviction the prisoner was an undischarged bankrupt, and after his conviction a trustee in a second bankruptcy was appointed to whom, by s. 3 of the Bankruptcy (Amendment) Act, 1926, any undistributed property belonging to the first trustee passed:—

Held, (1.) that the order of the judge in regard to money taken on his apprehension from the prisoner only applied to money belonging to the prisoner; (2.) that the after-acquired property of an undischarged bankruptcy was, by s. 38 of the Bankruptcy Act, 1914, the property of his trustee in bankruptcy, subject only, so long as the property remained in the hands of the bankrupt, to his power under s. 47 of the Act to make a title to his property and to his rights under the section, including the right to protect the property against wrongdoers; and (3.) that the second trustee in bankruptcy was, therefore, entitled to recover the sum of 1,581*l.* from the local authority.

Hosack v. *Robins* (*No.* 2) [1918] 2 Ch. 339, and *Hill* v. *Settle* [1917] 1 Ch. 319 applied on the second point. Dictum of Lawrence J. in *Dyster* v. *Randall & Sons* [1926] Ch. 932, 939 not followed.

Decision of Divisional Court [1944] W.N. 27 affirmed.

APPEAL from Divisional Court.

On August 26, 1920, the debtor was adjudicated bankrupt. On June 18, 1942, while still an undischarged bankrupt, he was convicted before Cassels J. at Northumberland Assizes of obtaining money by false pretences, conspiracy, and other criminal charges. Before his arrest the debtor had handed 2,000*l.* to a friend to hold for him and make certain payments for the benefit of his wife and family. A few payments out of the money had been made, but after the debtor's arrest the friend handed the balance to the police. Of this sum 1,581*l.* remained in the hands of the police, after 400*l.* had been paid to the debtor's solicitors for his defence, with the leave of Cassels J. After the trial Cassels J. made two orders under the Costs in Criminal Cases Act, 1908 (1), the first, under s. 1

(1) By Costs in Criminal Cases Act, 1908, s. 1, sub-s. 1: "The "following courts, namely—(*a*) a "court of assize . . . before which "any indictable offence is prose"cuted . . . may on any such "proceedings by order direct the "payment of the costs of the "prosecution or defence or both "in accordance with the pro"visions of this Act out of the "funds of the county or county "borough out of which they are "payable under this Act . . ."

By s. 6, sub-s. 1: "The court "by or before which any person is "convicted of an indictable "offence may, if they think fit, in "addition to any other lawful "punishment, order the person "convicted to pay the whole or "any part of the costs . . ." By sub-s. 5: "Any order under "this section may be enforced, as "to any costs primarily paid "out of local funds . . . in the "same manner as an order for "payment of costs made by the "High Court in civil proceedings ". . . and, in the case of costs "which a person convicted is "ordered to pay, out of any money "taken on his apprehension from "the person convicted, so far as "the court so directs."

of the Act, being that the Northumberland County Council should pay the costs of the prosecution and, the second, under s. 6 of the Act, that the debtor should pay forthwith to the council 2,500*l.* towards the costs of the prosecution, "the "sum of 1,581*l.* in the possession of the police to go towards the "payment of the costs." This sum, when received by the council from the police, was applied in paying the costs. On November 24, 1942, a second receiving order was made against the debtor on the petition of the council, and on January 6, 1943, a trustee was appointed in the second bankruptcy who, on July 9, 1943, applied by motion under s. 3 of the Bankruptcy (Amendment) Act, 1926, in the Newcastle-upon-Tyne county court, to recover the 1,581*l.* from the council. The motion was dismissed, and, on appeal, the Divisional Court (Morton and Cohen JJ.), held (1.) that the sum of 1,581*l.* vested in the first trustee in bankruptcy when the debtor acquired it and became vested in the second trustee in bankruptcy under s. 3 of the Bankruptcy (Amendment) Act, 1926, apart from the effect of the order of Cassels J.; (2.) that, as the first trustee in bankruptcy was not a party to the criminal proceedings, the order of Cassels J. could not affect his title to the money, and, therefore, could not operate as a bar to the claim of the second trustee in bankruptcy to recover it. The council appealed. On the appeal it was not denied that any assets remaining in the hands of the trustee in the first bankruptcy passed to the trustee in the second bankruptcy.

Beyfus K.C. and *Manningham-Buller* for the council. The sum of 1,581*l.* being "money taken on his apprehension "from the person convicted" was money in respect of which Cassels J. could validly make an order under s. 6, sub-s. 5, of the Costs in Criminal Cases Act, 1908. That order could be made whether or not the money was in fact the debtor's property, and the council's right to the money cannot be challenged save in the Court of Criminal Appeal. Cassels J.'s order depends for its validity on the Act of 1908 and not on the debtor's position with regard to after-acquired property. The order, therefore, could be made irrespective of the true ownership of the money although, of course, no judge would make such an order if he knew of a genuine adverse claim to the money. In any case, the money, being after-acquired property of the debtor as an undischarged bankrupt, remains vested in the debtor until the trustee in bankruptcy intervenes to take it. In *Dyster* v. *Randall & Sons* (1) P. O. Lawrence J. treated it as well-established that after-acquired property remains in the bankrupt until the trustee intervenes: see also *Cohen* v. *Mitchell* (2); other authorities were *Fowler* v. *Down* (3), *Webb* v. *Fox* (4) and *Hosack* v. *Robins* (*No.* 2) (5). All that the last-named case decided was that the charging order then in question did not fall within s. 47 of the Act. Section 38 of the Bankruptcy Act, 1914, which makes after-acquired property assets in the bankruptcy, does not prevent orders being made against the debtor in invitum before the trustee has intervened. It may be that the mere taking of the money by the police created a kind of lien: see *Reg.* v. *Roberts* (6); and s. 47 of the Act shows that, while after-acquired property remains in the possession of a bankrupt, he has various powers and rights with regard to it. The special ownership of the trustee in bankruptcy could not prevail over Cassels J.'s order.

Sir David Maxwell Fyfe S.-G. and *Aronson* for the trustee in the second bankruptcy. At the time of Cassels J.'s order the trustee in the first bankruptcy was the owner of the money, and admittedly any assets in that trustee have vested in the trustee in the second bankruptcy. The order of Cassels J. was res inter alios acta as regards the first trustee and not binding on him. The order as to the application of the money found in the debtor's possession was merely a direction regarding the method of enforcing the substantive order to pay 2,500*l.* towards the costs made under s. 6, sub-s. 5, of the Act of 1908. In *Reg.* v. *Roberts* (6) the right of the court of conviction to make such an order is declared by Blackburn and Quain JJ. to be to create something of the nature of a lien. It is then of the same nature as the charging order in *Hosack* v. *Robins* (*No.* 2) (5), which did not stand in the way of the trustee in bankruptcy claiming after-acquired property. Cassels J.'s order cannot prevail in regard to money not the debtor's money. The contention that the title in the after-acquired property remained in the bankrupt until the trustee intervened is inconsistent with s. 38 of the Bankruptcy Act, 1914, as was recognized in *Hill* v. *Settle* (7), although it was also recognized

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(1) [1926] Ch. 932, 939.
(2) (1890) 25 Q. B. D. 262.
(3) (1797) 1 B. & P. 44, 47.
(4) (1797) 7 T. R. 391.
(5) [1918] 2 Ch. 339.
(6) (1873) L. R. 9 Q. B. 77.
(7) [1917] 1 Ch. 319.

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that the bankrupt could, until the trustee had taken over the property, make a transfer for value under s. 47 of the Act. The view expressed by P. O. Lawrence J. in *Dyster* v. *Randall & Sons* (1) that the after-acquired property remained in the bankrupt until the trustee intervened to take it is only dictum and ought not to be accepted.

Manningham-Buller replied.

LORD GREENE M.R.: I find myself in complete agreement, not only with the conclusion to which the Divisional Court came, but also with the reasons for their decision as expressed in the judgment of Morton J. I shall confine my observations to the salient points in the argument addressed to us on behalf of the council. Two matters arise for decision—(1.) In whom was the title to the 1,581*l.* vested when Cassels J. made his order for the payment of the money to the council? and (2.) What was the effect of that order?

I will take the second point first. The answer to it depends on the true construction of s. 6, sub-s. 5, of the Costs in Criminal Cases Act, 1908, which can be described as a machinery sub-section. The scheme of the Act with regard to the payment of costs by a defendant in criminal proceedings of the kind dealt with by the Act is, first, that the costs of the prosecution may be directed to be paid out of the funds of the county or county borough. Such an order was made in the present case. Secondly, the court is also empowered, in addition to any other lawful punishment, in the case of indictable offences, to order the convict to pay the whole or any part of the costs of the prosecution. There can, accordingly, be two orders as to payment of costs, one against the county council, and the other against the convict. Sub-section 4 of s. 6 provides that both orders may be made, and that costs directed to be paid out of local funds shall primarily be payable out of those funds. That being the position it was necessary to provide a method by which the county council could be reimbursed in cases where a second order was made against the convict personally. That is provided for by sub-s. 5, by which the county council which has paid the costs is given three methods of recovering them from the convict. They may enforce the order against him as if it were an order for payment of costs in the High Court in civil proceedings, or as a civil debt in manner provided by the

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(1) [1926] Ch. 932, 939.

Summary Jurisdiction Acts, or "out of any money taken on "his apprehension from the person convicted, so far as the "court so directs." The sub-section, therefore, is concerned only with the method of enforcing the liability of the convict to the county council in respect of these costs.

It would be surprising to find that this personal liability of the convict could be satisfied out of property which was not his property. That, however, is the argument of the council in the present case. It is said that, whether or not the property in this money was in the debtor, Cassels J. had jurisdiction under the sub-section to order that the 1,581*l.* should be handed over to the council in part satisfaction of the costs which they had been directed to pay. It is said that the clear language of the sub-section shows that the title to the money taken on his apprehension from the person convicted is not a matter with which the legislature concerned itself, and that the legislature must have thought that it could be left to the judge in the exercise of his discretion to say in a case where the money did not belong to the convict that no order would be made. In my opinion, that argument cannot be accepted, because it involves the view that the judge in his discretion would be entitled to make an order for the payment of costs out of money which did not belong to the convict although, in deciding whether he would exercise it, he would not have before him the facts necessary to enable him to discover in whom the title to the money was. I cannot think of anything quite so unjust as a provision entitling the council in this case to satisfy a claim against the convict personally out of money other than money belonging to him.

It is said, however, that the language of the sub-section is too strong to admit of any other construction. I cannot so construe it. I think it would require the clearest and most precise language to give a court power to make the money of A. applicable for the discharge of the liabilities of B, in circumstances where the court cannot have before it the evidence necessary to decide who has the title to the money. It seems to me that this part of the sub-section must be construed as giving power to make an order only so far as the money belongs to the person convicted. The court which makes the order is not concerned on that basis to inquire into the title to the money. If the money is found on the convict the jurisdiction to make the order arises, but that jurisdiction, in my opinion, cannot extend to destroy the title of the real owner of the money, and any order made under it must be valid only in so far as the money with which it deals is in fact the property of the convict. The local authority who receives the money under such an order cannot complain of any hardship if it is compelled afterwards to hand it back to the true owner, because in such a case it has no claim in fairness to hold that money against him. The sub-section must be construed in the limited way I have indicated. It was argued by Mr. Beyfus that the sub-section provides for the making of an order in rem which is valid against the whole world. The jurisdiction to make an order in rem is one of very limited scope in our jurisprudence. Examples of it are very few indeed, and I certainly cannot construe this sub-section as giving any such jurisdiction when so to hold would mean that a person's money is liable to be taken away from him in proceedings in which be has no opportunity of appearing and bringing the true facts before the court. In my opinion that argument fails.

Turning to the first point, a number of cases were referred to, of which *Cohen* v. *Mitchell* (1) is the leading modern authority. Those cases showed that transactions by an undischarged bankrupt with third persons had a measure of protection, and s. 47 of the Bankruptcy Act, 1914, merely put into statutory form, with some additions, what was the law before that Act. That protection operated in two ways. First, third persons who acquired property in a transaction of the kind described had a good title to it which could not be impugned by the trustee in bankruptcy. Secondly, a party to such a transaction with an undischarged bankrupt could not set up as against the undischarged bankrupt the title of the trustee unless, of course, the trustee had intervened. In other words, the bankrupt was entitled to deal with his after-acquired property by means of transactions with third persons of the kind specified, and as against him the person with whom he dealt could not dispute his title, but these cases clearly do not establish the proposition that, as between the bankrupt and the trustee, after-acquired property belongs to the bankrupt until the trustee claims it. I can find no support for that proposition. The precise relationship of the bankrupt to his after-acquired property has been described by various analogies. He has been likened to a factor or some other agent having authority to pass the title to the goods. He has been likened to a trustee. None of those analogies are really accurate and, of course, they

(1) 25 Q. B. D. 262.

cannot be pressed. He has certain powers to confer a title to, and certain rights in respect of, his after-acquired property. Thus, he has the right to protect it against wrongdoers, but the title of the trustee is only qualified by those rights given to the bankrupt by s. 47, which protect transactions with third parties but do not in any way qualify the title of the trustee, save in so far as that title is liable to be impaired in cases which fall under the section. The initial proposition on which the argument is based, namely, that the property is in the bankrupt until the trustee intervenes, not only does not find any authority but is quite contrary to the clear language of the statute. Section 38, para. (*a*) provides, in terms, that the property of the bankrupt which vests in the trustee is to comprise "All such " property as may belong to or be vested in the bankrupt at " the commencement of the bankruptcy, or may be acquired " by or devolve on him before his discharge." I see no ground whatsoever for writing into that a provision that the property is only to vest in the trustee if and when he intervenes. Again s. 47, sub-s. 1, itself recognizes the estate of the trustee because it says " any estate or interest in such property which by virtue " of this Act is vested in the trustee shall determine and pass " in such manner and to such extent as may be required for " giving effect to any such transaction." The trustee's property is qualified, but is qualified only to the extent of protecting the specified transactions. Subject to that the property is in the trustee.

I do not think it necessary to examine all the authorities to which we have been referred, but I would like to say a word about two of them. *Hosack* v. *Robins* (*No.* 2) (1), was a case where a charging order had been made against shares which had been acquired by an undischarged bankrupt. It was held that that charging order, which was, of course, made in invitum, was not a transaction within the meaning of s. 47, and, accordingly, was not subject to the protection given by that section, but it is to be observed that, if the theory put before us is right, the shares belonged to the bankrupt at the date of the charging order, and, therefore, it would follow that the charging order was good. The only way of escaping from that result would have been by saying that the intervention of the trustee had a retroactive effect and invalidated something which was a charge imposed on property of the bankrupt before the intervention took place. It is to be observed that in *Hosack* v. *Robins* (*No.* 2) (1) it was never suggested in argument that the property was in the bankrupt at the time of the charging order, and, therefore, that the charging order, was bound to be good. The decision in that case is quite inconsistent with the council's argument in the present case. The main point in *Hill* v. *Settle* (2), another case decided in this court, was whether, where a transaction had been entered into and before its completion the trustee had intervened, a purported revocation of that intervention would be effective, but the court went into the matter of the title, and Lord Cozens-Hardy M.R. said (3): " Previously " that is previously to the Act of 1883—" the property was vested in " different persons—the commissioners, or assignees, or what- " ever they were; it is now vested in the trustee, and after- " acquired property, according to the language of the statute, " is also vested in him. Then, by a long series of authorities " which it is quite impossible, I think, for this court, or any " court, to review, it was held that that vesting could not be " regarded as operating in the strict and full sense of the term. " As long as the trustee did not intervene, the bankrupt him- " self had power to enter into transactions for value with " persons dealing with him bona fide in relation to his after- " acquired property. That is dealt with in so many cases that " I do not think it is necessary for me to refer to any more " than *Cohen* v. *Mitchell* (4)." After dealing with the facts relating to the intervention in that case, he says (5): " Assuming, as in my view I have stated is the fact, that there " was a good intervention, from the date of the notice the " property cannot be recovered by or dealt with by the bank- " rupt." Then Warrington L.J. says (6): " The law, stated " shortly, would appear to be this: Under the provisions of the " Bankruptcy Acts, property acquired by the bankrupt, in- " cluding rights of action under contracts subsequent to the " date of the order of adjudication (after the commencement " of the bankruptcy), is vested in the trustee. So far the " provisions of the Acts of Parliament appear to be clear. But " by a long series of decisions it is now settled that, although the " property is vested in the trustee, to use the words of Lord " Esher in the Court of Appeal in *Cohen* v. *Mitchell* (4):

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(1) [1918] 2 Ch. 339.

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(1) [1918] 2 Ch. 339.
(2) [1917] 1 Ch. 319.
(3) Ibid. 324.
(4) 25 Q. B. D. 262.
(5) [1917] 1 Ch. 326.
(6) Ibid. 328.

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" 'Until the trustee intervenes, all transactions by a bankrupt " 'after his bankruptcy with any person dealing with him " 'bona fide and for value, in respect of his after-acquired " 'property, whether with or without knowledge of the " 'bankruptcy, are valid against the trustee.' " It is to be noticed that the thing which is valid is the transaction, and to validate a transaction by an undischarged bankrupt comes nowhere near saying that the title to after-acquired property remains in the bankrupt. The old exception, which is now statutory under s. 47, dealt with transactions and had nothing to do with the title to property as between the bankrupt and the trustee. It had merely to do with the title to property as between the trustee, on the one hand, and the third person with whom the transaction was carried out, on the other. The observation of Lawrence J., as he then was, in *Dyster* v. *Randall & Sons* (1), cannot, I think, be construed as intending to differ in any way from what was said by this court in *Hill* v. *Settle* (2), as a member of which Lawrence J. sat. If it has the meaning which is attributed to it by Mr. Beyfus, all I need say is that it is dictum only and cannot stand against the other authorities which I have mentioned. I do not think it would be fair to Lawrence J. to construe these words as anything but a quite general introduction to the statement of the law relevant to the matter before him which he was about to make. In the result the appeal must be dismissed with costs.

MacKinnon L.J.: I agree. I am quite clear that the words at the end of sub-s. 5 of s. 6 of the Costs in Criminal Cases Act, 1908, must be read as though the words " of his " were added, that is to say, " out of any money of his taken on his apprehension." That, I think, was clearly laid down by Blackburn J. as long ago as 1873 in *Reg.* v. *Roberts* (3), under the identical words which then existed in the Forfeiture Act, 1870. Clearly, Cassels J. made this order on the assumption that the money found in the possession of the convict was his. There was nobody to suggest the contrary. Any order made in such circumstances ought to be read subject to the implied qualification " unless someone not before the court is " able to prove that this money, in the possession of the " convict, was, in truth, not his property." I agree that the

(1) [1926] Ch. 932, 939.

(2) [1917] 1 Ch. 319.

(3) L. R. 9 Q. B. 77.

appeal fails. I do not wish to say anything about the other point in the case.

Luxmoore L.J.: I also agree that the appeal fails.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co. for C. Harold Carter, Newcastle-upon-Tyne; Solicitor to Board of Trade.*

H. C. G.

In re SCARISBRICK RE-SETTLEMENT ESTATES.

COHEN J.
1944
Feb. 4, 28.

Settled land—Mansion house—Maintenance—Application of capital money—Advance out of capital to enable tenant for life to continue to live in mansion house—Jurisdiction—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 64—*Settled Land and Trustee Acts* (*Court's General Powers*) *Act,* 1943 (6 & 7 *Geo.* 6, *c.* 25), *s.* 1, *sub-s.* 1.

An application was made under s. 64 of the Settled Land Act, 1925, as amended by s. 1, sub-s. 1, of the Settled Land and Trustee Acts (Court's General Powers) Act, 1943, that the trustees of certain settled property might raise 10,000*l.* out of capital to enable the tenant for life to continue to live in the mansion house:—

Held, that the jurisdiction conferred on the court by s. 64 was not restricted by s. 1, sub-s. 1, of the Act of 1943; that the proposed transaction was for the benefit of the settled land and the persons interested under the settlement; and that the application should be granted.

Adjourned summons.

By a deed of re-settlement, dated December 21, 1917, the Scarisbrick Estate was settled on Sir Tom Talbot Leyland Scarisbrick as tenant for life in possession with remainder to his son, Everard Talbot Scarisbrick, as tenant for life in possession with remainders over. In 1923 the mansion house, known as Scarisbrick Hall, with the adjoining grounds became part of the settled estate. Sir Tom Scarisbrick died on May 18, 1933, and Sir Everard Scarisbrick became tenant for life of the settled property. Under the terms of the re-settlement certain moneys and investments arising from a part of the estate known as the Scarisbrick Town Properties were settled as capital money. As the income from the estate was insufficient to enable the tenants for life to continue to live

COHEN J.

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SCARISBRICK RE-SETTLEMENT ESTATES, *In re.*

at Scarisbrick Hall, the capital was resorted to from time to time. In 1942, the income having been considerably reduced owing to taxation and other circumstances, it became clear that, unless a substantial sum could be raised out of capital in aid of income, Scarisbrick Hall would have to be abandoned as the residence of the tenant for life and if possible sold, but it was thought unlikely that a satisfactory sale could be effected during or soon after the end of the present war, and it was expected that, until a sale was effected, the expenditure on the upkeep of the hall necessary to maintain its selling value would be heavy. A summons was taken out by the tenant for life under s. 64 of the Settled Land Act, 1925, as amended by the Settled Land and Trustee Acts (Court's General Powers) Act, 1943 (1), asking the court to authorize the trustees of the re-settlement to raise 10,000*l*. by the sale of investments representing capital from the Scarisbrick Town Properties to enable the tenant for life to maintain and carry on Scarisbrick Hall as his residence and to execute such repairs as should be necessary. The question arose whether, having regard to the provisions of the Settled Land and Trustee Acts (Court's General Powers) Act, 1943, the court had jurisdiction to make the order.

Harman K.C. and *McMullan* for the tenant for life. The transaction is within the powers conferred on the court by

(1) Settled Land Act, 1925, s. 64 : " 1. Any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorized by this Act or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected, by an absolute owner. (2.) In this section 'transaction' includes . . . . any application of capital money."

Settled Land and Trustee Acts (Court's General Powers) Act, 1943, s. 1 : " (1.) The jurisdiction of the court under s. 64 of the Settled Land Act, 1925 (which confers power on a tenant for life to effect under an order of the court any transaction, including an application of capital money) . . . . shall include power, in the circumstances specified in subsection 2 of this section, to make an order authorizing any expense of action taken or proposed in or for the management of settled land . . . . to be treated as a capital outgoing, notwithstanding that in other circumstances that expense could not properly have been so treated."

s. 64 of the Settled Land Act as amended by the Settled Land and Trustee Acts (Court's General Powers) Act, 1943. The evidence shows that it will be clearly for the benefit of the settled land and the persons interested under the settlement. [He referred to *In re White-Popham Settled Estates* (1) and *In re Salting* (2).] The Act of 1943 is expressed to be framed to extend the powers of the court under s. 64 of the Settled Land Act, 1925, and not to restrict them. The court, therefore, still has the jurisdiction conferred on it by s. 64, and must decide on the evidence whether this is a proper case to make the order.

Pennnycuick for the trustees. The trustees do not oppose the application on its merits, but it is submitted that the Act of 1943 has changed the position as regards jurisdiction. This transaction is wholly for the benefit of the tenant for life, but the court has no jurisdiction to authorize it. The effect of the Act of 1943 is to restrict the power of the court to make an order authorizing the raising of money out of capital to cases where that is necessary " for the management " of settled land."

Harman K.C. replied.

Cur. adv. vult.

Feb. 28. COHEN J. read a judgment in which, after stating the facts, he said : I now turn to the question of jurisdiction. Mr. Harman relies on s. 64 of the Settled Land Act, 1925, as amended by the Settled Land and Trustee Acts (Court's General Powers) Act, 1943. He says that I can authorize any application of capital money, provided that I am satisfied that the transaction affects the settled land or any part thereof or any other land, and is either (*a*) for the benefit of the settled land or any part thereof, or (*b*) for the benefit of the persons interested under the settlement. Mr. Pennycuick, on behalf of the trustees, while favouring the application on its merits, says that I have no jurisdiction to authorize the transaction under s. 64. He admits that before the passing of the Settled Land and Trustee Acts (Court's General Powers) Act, 1943, it was generally accepted that such payments could be authorized if the conditions were satisfied, but he submits that that Act makes it clear that this view was erroneous.

(1) [1936] Ch. 725.

(2) [1932] 2 Ch. 57.

He says that, if it were correct, there would have been no need for s. 1 of the Act of 1943. That Act has as its title: "An Act to extend temporarily the powers of the court under "s. 64 of the Settled Land Act, 1925, and s. 57 of the Trustee "Act, 1925; and to amend the first-mentioned section as "respects improvements."

[His Lordship read s. 1, sub.-ss. 1, 2, 3 and 5, of the Act of 1943 and continued:] In the case before me there is no doubt that the evidence establishes a deficiency of available income and that the other conditions mentioned are satisfied, but Mr. Pennycuick contends that that section only authorizes the application of capital moneys in "management" as defined by sub-s. 5. He further points out that some of the items on which it is proposed to expend the 10,000*l.* do not come within the definition—for example, the cost of an abortive application to Parliament in relation to the settled estates in 1940. He says that, this being so, such application of capital moneys, if ever authorized by the Act of 1925, must be regarded as having been excluded by the Act of 1943. There can, in my view, be little doubt about the jurisdiction before the Act of 1943, in view of the decision in *In re White-Popham Settled Estates* (1); and it would be strange if an Act entitled as one to extend (not modify) powers in fact restricted them. I can find nothing in the language of the section which would justify me in imposing any such restriction.

I, therefore, conclude that, if I consider that the conditions specified in s. 64 of the Act of 1925 are satisfied, I have jurisdiction to make the desired order. I have already indicated that, in my view, the second condition is satisfied, that is to say, that the transaction is one for the benefit of the persons entitled under the settlement. As regards the first condition, it may be argued that some of the expenditure, e.g., the advances already made to the applicant including the advance in connexion with the abortive bill, did not directly affect or concern the settled land. This is, I think, doubtful, but I will assume that it is well-founded. Even so, I am satisfied that I have jurisdiction, for it is clear that, if the applicant had to repay those advances, the deficiency in his income would be such that he could not continue to reside in and maintain Scarisbrick Hall. His continued residence for the time being is established by evidence to be essential for

(1) [1936] Ch. 725.

the preservation of the hall. In these circumstances, all the conditions prerequisite to the making of an order are, in my opinion, satisfied.

Solicitors: *Pritchard, Englefield & Co., for Buck, Cockshott & Cockshott, Southport.*

J. L. D.

In re SERPELL & CO., LIMITED.

UTHWATT J.
1944
March 13.

Company—Reduction of capital—Redeemable preference shares already redeemed—Whether part of nominal capital—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 46, *sub-s.* 4.

The capital of a company consisted of 210,000*l.* divided into 110,000 seven per cent. redeemable preference shares of 1*l.* each and 100,000 ordinary shares of 1*l.* each, fully paid up. After 24,500 of the preference shares had been redeemed, the company presented a petition for the sanction by the court of the reduction of the capital to 100,000*l.*, consisting of 100,000 ordinary shares of 1*l.* each, by the extinction of the remaining preference shares:—

Held, that, having regard to s. 46, sub-s. 4, of the Companies Act, 1929, the preference shares on redemption ceased to form part, not only of the issued and paid-up capital, but also of the nominal capital of the company.

PETITION.

The original capital of a company was 210,000*l.*, consisting of 110,000 seven per cent. redeemable preference shares of 1*l.* each and 100,000 ordinary shares of 1*l.* each, fully paid up. Of these preference shares 24,500 were redeemed before April, 1939. At an extraordinary general meeting of the company on April 28, 1943, it was resolved "that the capital "of the company, which now consists of 185,500*l.* divided "into 85,500 seven per cent. redeemable preference shares "and 100,000 ordinary shares of 1*l.* each, all fully paid up, "be reduced to 100,000*l.*, divided into 100,000 ordinary shares "of 1*l.* each, and that such reduction be effected by ex"tinguishing the said redeemable preference shares." A petition was presented by the company for the sanction by the court of the reduction, and the question arose whether redeemable preference shares, which had been redeemed in accordance with the provisions of s. 46 of the Companies

UTHWATT J.

1944

SERPELL & CO., LD., *In re.*

Act, 1929 (1), continued to form part of the nominal capital of the company.

Geoffrey Cross for the company.

UTHWATT J. The question raised by this petition does not seem to have been the subject of any formal decision. It is whether redeemable preference shares which have been redeemed pursuant to s. 46 of the Companies Act, 1929, still form part of the nominal capital of the company.

It is clear that the effect of the redemption is that the shares cease to form part of the paid-up capital and of the issued capital of the company, but do they still form part of the nominal capital? On this point, which is merely a question of the construction of s. 46, there is, perhaps, room for some difference of opinion. I take the view that the effect of the redemption of preference shares is not merely to extinguish them as issued capital and paid-up capital, but also to get rid of them entirely as part of the nominal capital. I found my view on the terms of s. 46, sub-s. 4, of the Act. The previous sub-sections of s. 46 give a company power to issue preference shares which are, or are liable, to be redeemed, and provide for the method in which redemption may be effected and for the creation on redemption of a capital redemption reserve fund equal to the amount applied in redemption. The first three sub-sections of s. 46, taken alone, are consistent either with the view that the redeemed shares remain part of the nominal capital of the company or with the view that those shares are cancelled for all purposes, but it appears to me that the substantial part of sub-s. 4 and the proviso to that sub-section proceed on the footing that, where redemption has been effected, the shares redeemed disappear for every purpose. The power given is not to reissue the shares redeemed, but to issue shares, and those shares may be issued on any terms justified by the company's articles. That power, on exercise, is not to attract stamp duty, and stamp duty is never payable on the occasion of the issue of share capital, but only on its creation. Sub-section 4, therefore, assumes that creation of share capital is involved in an issue pursuant to the sub-section.

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(1) By Companies Act, 1929, s. 46, sub-s. 4: "Where in "pursuance of this section a "company has redeemed or is "about to redeem any preference "shares, it shall have power to "issue shares up to the nominal "amount of the shares redeemed "or to be redeemed as if those "shares had never been issued, "and accordingly the share capital "of the company shall not for the "purposes of any enactments "relating to stamp duty be "deemed to be increased by the "issue of shares in pursuance of "this subsection: Provided that, "where new shares are issued "before the redemption of the "old shares, the new shares shall "not, so far as relates to stamp "duty, be deemed to have been "issued in pursuance of this sub-"section unless the old shares are "redeemed within one month "after the issue of the new "shares."

In the result, therefore, I think that the nominal capital, as well as the issued and paid-up capital, represented by cumulative preference shares which have been redeemed disappears on redemption. The minute in this case will proceed on the basis that the redemption of cumulative preference shares effected some years ago reduced the nominal, as well as the issued and paid-up, capital of the company.

Solicitors: *Walter, Burgis & Co.*

J. L. D.

In re HILLAS-DRAKE DECD.

NATIONAL PROVINCIAL BANK *v.* LIDDELL.

SIMONDS J.

1944

Feb. 3, 17.

Administration—Valuation—Date—Date of distribution—Will—Shares of residue to children—Advancement—Advances settled by testator—Hotchpot clause—Rights of advanced beneficiaries in respect of income.

Where a testator has by his will given personal estate to be divided in shares among his children or issue, and has directed that any advances which he has given to or settled on the beneficiaries during his lifetime are, in ascertaining their shares of his estate, to be brought into hotchpot, it is a general rule of administration, whether in court or out of court, settled by practice over a long course of years, that, in ascertaining the shares of the beneficiaries, the distributable assets are to be valued as at the date of distribution and not at the date of the testator's death, and that advanced beneficiaries are to be debited with interest at four per cent. per annum on the amount of their advances down to the date of distribution. This rule should always be observed, unless there is an express direction in the will to the contrary.

In re Tod [1916] 1 Ch. 567 and *In re Wills* [1939] Ch. 705, followed and applied.

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In re Mansel [1930] 1 Ch. 352; *In re Gunther's Will Trusts* [1939] Ch. 985; and *In re Oram* [1940] Ch. 1001, dissented from as not being in accordance with the general practice of the court.

ADJOURNED summons.

By his will, dated April 2, 1930, the testator, Thomas Standish Hillas-Drake, devised and bequeathed all his estate to his trustees on trust for sale and for investment of the proceeds of such sale (subject to the payments therein mentioned) in the investments therein mentioned and directed his trustees to hold such proceeds and investments (therein called his trust fund) on trust to pay certain annuities out of the income thereof and to pay the residue of such income to his wife during her life and subject thereto to hold the whole of his trust fund in trust as to one equal third part for his son Robert, as to one other equal third part for his daughter Beatrice, and the remaining third part for his daughter Ella. He then made provision for the settlement of his children's shares, and by cl. 15 directed that any securities settled by him on the marriage of any of his children should be brought into hotch-pot by such child in ascertaining his or her share of his trust fund and that the value of such respective securities should be the cost to him of the same as shown by his "investments book," and he further directed that certain other moneys should be similarly brought into hotch-pot by his son. The testator died on February 26, 1941. His widow died on March 15, 1941. The amounts to be brought into hotch-pot were agreed to be 7,368*l.* by the son, 3,846*l.* by the daughter Beatrice, and 4,257*l.* by the daughter Ella. The summons was taken out by the plaintiff bank, as executor of the testator, asking whether, for the purpose of ascertaining the shares of the testator's children in his estate, it should be valued as at the date of his death, or at the date of distribution, or at some other and what date, and how the rights of the beneficiaries in the income of the estate down to the date of distribution ought to be ascertained.

Danckwerts for the plaintiffs.

Geoffrey Cross for the testator's daughters. The estate should be valued, for the purpose of adjusting the rights of the legatees, as at the date of distribution. This was done as regards income in *In re Wills* (1) and the same rule should

(1) [1939] Ch. 705.

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be applied to both income and capital. In *In re Gunther's Will Trusts* (1), however, Farwell J. ordered the estate to be valued as at the date of the testator's death, and this decision was followed by Bennett J. in *In re Oram* (2). These decisions purported to follow *In re Hargreaves* (3), but that was an exceptional case and is distinguishable on the facts. In deciding it, the court was not laying down any general rule. It is submitted that it is impossible to reconcile *In re Gunther's Will Trusts* (1) and *In re Oram* (2) with *In re Wills* (4), and that the two first-named cases were wrongly decided. In *In re Tod* (5) Sargant J. said that the general principle now contended for and laid down in *In re Poyser* (6) ought to have been followed throughout.

Wilfrid Hunt for the testator's son adopted the above argument. All the cases are inconsistent with a capital valuation at the death. It would be absurd to value the income on one principle as at one date and the capital as at another date. The advances must be added to the estate as at the date of distribution, and the total equally divided, and the advances then deducted from the respective shares. This has always been the practice in administration.

Cur. adv. vult.

SIMONDS J. read a judgment in which, after stating the facts, he said: There is nothing in the material facts to distinguish this estate from many others which are administered by the court or out of court, and it is strange that it should have been necessary, as undoubtedly it was necessary, for the executors to seek the guidance of the court on the questions that have been raised. These questions relate (*a*) to the date at which the distributable assets of the estate ought to be valued for the purpose of the hotch-pot clause, and (*b*) as to the manner in which the rights of the beneficiaries in the income of the estate up to the date of distribution ought to be ascertained. These two questions are logically inter-connected, for if the assets of the estate ought to be valued at the death of the testator for the purpose of hotch-pot so that the fractional share of each beneficiary in the ultimately dis-

(1) [1939] Ch. 985.
(2) [1940] Ch. 1001.
(3) [1903] 88 L. T. 100.
(4) [1939] Ch. 705.
(5) [1916] 1 Ch. 567.
(6) [1908] 1 Ch. 128.

tributable estate is once and for all determined on that basis, it would surely be logical that each beneficiary should have the same fractional share of the income since the death and it would be unnecessary to have recourse to the method of adjustment which has been commonly adopted, namely, that the advanced beneficiary should bring into hotch-pot on income account four per cent. per annum on the amount of his advances and be debited therewith against his share of such income. In my judgment, the fact that such a method has been for so long the common practice of administration in and out of court is of great importance in considering what is the proper date for valuation

I should have entertained no doubt what is the proper date for such valuation but for *In re Gunther's Will Trusts* (1), in which Farwell J. delivered a considered judgment, and *In re Oram* (2) in which Bennett J. followed his decision. In the first place, since the object of a hotch-pot provision is to ensure equality between beneficiaries, it is relevant to ask what date for valuation will serve that end. If I take the date of distribution as the proper date, I have no difficulty in securing equality. If there are three beneficiaries, of whom one has been advanced 10,000*l.*, and there is available for distribution money or securities of the value of 50,000*l.*, I add the 10,000*l.* to the 50,000*l.* and give each beneficiary 20,000*l.*, debiting 10,000*l.* against the advanced beneficiary. If, on the other hand, I take the date of the testator's death as the proper date, and value as at that date the assets which are available for distribution, I do not necessarily secure equality. It is, indeed, almost certain that I shall obtain inequality in greater or less degree.

Let me take a simple example. Again I have three beneficiaries, of whom one has been advanced 10,000*l.*, and assets available for distribution of the value of 50,000*l.*, but these assets at the date of the testator's death were worth not 50,000*l.* but 40,000*l.*, and on this assumption it is by reference to this value that the shares of the beneficiaries are to be finally ascertained. Accordingly, the advanced beneficiary will take 6666/40,000ths and each of the other beneficiaries 16,666/40,000ths of the distributable estate. The value of the estate being increased from 40,000*l.* to 50,000*l.*, the share of the advanced beneficiary will be approximately 8,333*l.*, and that of each unadvanced beneficiary 20,833*l.* So far from

(1) [1939] Ch. 985.
(2) [1940] Ch. 1001.

equality being produced by this method of hotch-pot, the advanced beneficiary loses in the distribution substantially more than he has gained by his advancement. Conversely, if the assets have depreciated between the death and the date of distribution, this method of applying the hotch-pot provision will allow the advanced beneficiary to retain a substantial advantage. On principle there seems no reason for adopting such a method. Why should the court, aiming at equality, deliberately miss the mark ?

Secondly, in a matter of this kind, it is very relevant to consider what has been the practice of the court. I assume for this purpose that there has been no special direction in the will or other instrument under which advances are brought into hotch-pot. If there is such a direction the practice of the court, however fair and convenient, may be abrogated, for it is the privilege of a testator to say " stet pro ratione "voluntas." In its absence there is, I believe, an overwhelming case for saying that the practice of the court has been to take the value of the estate at the date of distribution as that by reference to which the rights of the beneficiaries must be adjusted. It is not so long ago that administration by the court, with consequent orders on further consideration, was far more common than it is to-day, and no unusual feature of those orders was a provision which worked out the rights of the beneficiaries on a hotch-pot. Mr. Hunt, than whom no counsel at the Bar has had a wider experience, was clear that the practice had been in accord with what appeared to be the principle, and that the relevant date has always, in the absence of a special provision, been the date of distribution. In this view the chief registrar and the chief master, whom I consulted, concurred.

Finally, it may, perhaps, be regarded as conclusive of practice that in Seton's Judgments and Orders, 7th ed., numerous examples are to be found of orders in which on distribution the rights of advanced and unadvanced beneficiaries are adjusted by reference to value at that date ; see e.g. vol. I., p. 217, vol. II., pp. 1435, 1436 ; but no order, so far as my researches have gone, can be found in which the court has directed the valuation as at the death of a fractional distribution based on that valuation.

It has been said that there is no direct authority on that matter apart from the cases to which I referred earlier in my judgment. From this I dissent. There can be no more cogent

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authority on a question of this kind than the long practice of the court. The law is implicit in the orders that the court has made. Moreover, though in *In re Tod* (1) Sargant J. was primarily concerned with the scope of the decision in *In re Hargreaves* (2) with regard to income, he dealt there also with capital and expressly declined to adjust rights in capital on the basis of a valuation at the death and of fractional shares thus ascertained.

I emphasize the point to which I made earlier reference. It is, perhaps, a practical possibility to combine a distribution of capital on the basis of a valuation of assets at the death with a distribution of income on the footing that the advanced beneficiary is charged with interest on his advances, but the combination is utterly illogical and unscientific, and it is a fair conclusion that such a method of dealing with income was devised just because capital was distributable, not on the basis of a valuation made at the death, but on the basis of actual value at the date of distribution. I do not need to repeat what I discussed at length in *In re Wills* (3), where I showed that for at least one hundred years this had been the common method of dealing with income in the absence of any contrary direction.

It is with these considerations in mind that I come to *In re Gunther's Will Trusts* (4). The will there under discussion had no peculiar features. It was, indeed, expressly pointed out that there was nothing to indicate that the testator had in mind any date at which the estate should be valued for the purpose of adjusting the rights of the beneficiaries inter se. There, as here, it was against the share of a residuary trust fund similarly defined that advances had to be brought into hotch-pot, and the learned judge held that the valuation should be made at the date of the death of the testator and the rights of the beneficiaries adjusted accordingly. He treated the question as one wholly at large on which he had no authority to guide him, and he rejected the cases in which distribution of income had been discussed as affording him no assistance. He made no reference to the practice of the court, and finally fixed the date of death as that on which the valuation should be made and the rights adjusted on the ground that, if any other date were taken, the rights of the beneficiaries would vary according to the speed and energy with which the executors

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(1) [1916] 1 Ch. 567.

(2) 88 L. T. 100.

(3) [1939] Ch. 705.

(4) [1939] Ch. 985.

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administered the estate and were in a position to distribute it. With all deference, I think that this reason has little cogency. It ignores the fact that it is only by taking the value at the date of distribution that the postulated equality is reached and that the rules and practice of the court assume and require due diligence in administration. Ought I in the circumstances to follow this decision? I think not. Uniformity, consistency, certainty in the law, these are highly important attributes of our legal system, and I would not advance my own opinion against the considered judgment of Farwell J. if I thought that by doing so I made a breach in the principle which judges of co-ordinate jurisdiction are bound to observe, but, in my opinion, it is the judgment in *In re Gunther's Will Trusts* (1), followed by Bennett J. in *In re Oram* (2), which is out of line with authority, and is inconsistent with long established principle and practice. I do not doubt that, deciding, as I do, that the rights of beneficiaries advanced and unadvanced must be adjusted on the basis of the value of the distributable assets as at the date of distribution, I do but reaffirm the old practice of this court and stand again in the ancient way.

On the second question, namely, the adjustment of rights in respect of income, I need not repeat what I said at length in *In re Wills* (3) and have already indicated in this judgment. There being no provision to the contrary in the will, the advanced beneficiaries will be debited against their share of residuary income with interest at four per cent. per annum less tax on the amount of capital brought into hotch-pot by them.

I think that answers all the outstanding questions.

Solicitors: *Shelton, Cobb & Co., for Coles & James, Eastbourne.*

(1) [1939] Ch. 985.
(2) [1940] Ch. 1001.
(3) [1939] Ch. 705.

H. L. L.

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1944

Feb. 22.

ATTORNEY-GENERAL *v.* ULVERSTON URBAN DISTRICT COUNCIL.

Local government—Official—Appointment of membe° of local authority—Appointment without salary for first twelve months—" Paid office "—Local Government Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 122.

A member of a district council was appointed by that authority to be clerk of the council on the terms of an offer by him immediately to resign his membership of the council and to serve as clerk in an honorary capacity for twelve months from the date of his appointment :—

Held, that the appointment was to a " paid office " within the meaning of s. 122 of the Local Government Act, 1933, and was, therefore, invalid.

Motion for judgment.

The plaintiff, on the relation of three members of the Ulverston Urban District Council, brought an action against the council claiming a declaration that the appointment by the council of Frank Jackson to be clerk of the council, but without salary for the first twelve months, was invalid, and for an injunction to restrain the council from so employing him. On June 18, 1943, the general purposes committee of the council resolved to advertise for a clerk to the council, at a salary of 450*l.* a year, in succession to a Mr. Poole, who had died. Several answers to the advertisement were received and three candidates were interviewed of whom one, Frank Jackson, was a member of the council. On July 12, 1943, Jackson applied for the appointment in a letter in which he stated that he knew that, owing to s. 122 of the Local Government Act, 1933 (1), he was debarred from being appointed to any paid office under the council until he had ceased to be a member of the council for over twelve months, but that the section did not prevent the council, if they thought fit, from appointing him to the position in an honorary capacity in which he would continue for twelve months. He was prepared to resign his position as councillor immediately. On July 29, 1943, at a special meeting of the council, a resolution was passed by a majority of six to five votes that

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(1) By s. 122 of the Local Government Act, 1933 : " A person shall, so long as he is, and " for twelve months after he " ceases to be, a member of a " local authority, be disqualified " for being appointed by that " authority to any paid office, " other than to the office of " chairman, mayor or sheriff."

Councillor Frank Jackson be appointed clerk on the terms set out in his application. This action was then begun.

F. Landau for the Attorney-General. The appointment is invalid and illegal. The section prohibits the appointment of a councillor to a " paid office," and it makes no difference that Jackson has resigned from the council and agreed to serve without salary for twelve months. [He referred to *Delane* v. *Hillcoat* (1) and *Greville-Smith* v. *Tomlin* (2).]

The defendants did not appear.

SIMONDS J. The question which I have to determine is whether Mr. Jackson has been appointed to a " paid office " within s. 122. In my judgment the office to which he has been appointed is a " paid office " within the true meaning of the section, notwithstanding that he has agreed to act in an honorary capacity. The case is by no means easy, but, in my opinion, the facts bring it within the mischief of the statute. I shall make the declaration of invalidity asked for, and grant an injunction accordingly.

Solicitors: *Burton, Yeates & Hart, for Hart Jackson & Sons, Ulverston, Lancs.*

(1) (1829) 9 B. & C. 310. (2) [1911] 2 K. B. 9.

H. L. L.

B. A. COLLIERIES, LIMITED *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY.

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Feb. 1, 2, 3; *Mar.* 15.

Mine—Coal mine—Railway—Area of protection—Notice of intention to work minerals—Counter-notice to leave minerals unworked—Compensation payable by railway company—Assessment—Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict., c.* 20), *s.* 78, *sub-s.* 4; *s.* 78A, *sub-s.* 1; *s.* 79A, *sub-s.* 1 (*as replaced by Mines* (*Working Facilities and Support*) *Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 20), *s.* 15).

In assessing the compensation payable by a railway company to a mine-owner under s. 78A, sub-s. 1, of the Railway Clauses Consolidation Act, 1845, as replaced by s. 15 of the Mines (Working Facilities and Support) Act, 1923, for the loss caused by minerals being left unworked pursuant to a counter-notice served by the railway company on the mine-owner under s. 78, sub-s. 2, of the Act of 1845 (as replaced), no reduction must be made in valuing these sterilized minerals in respect of the liability imposed on the mine-owner by s. 79A of the Act of 1845 (as replaced) to contribute towards the expenses of making good any damage to the railway or railway works which would have been caused if the sterilized minerals had been worked.

Decision of Morton J. [1943] Ch. 406 reversed on this point.

APPEAL from Morton J. (1)

The plaintiffs were "mine-owners" within s. 85D of the Railway Clauses Consolidation Act, 1845, as replaced by s. 15 of the Mines (Facilities and Support) Act, 1923. Section 78 (as replaced) prescribes the conditions under which minerals under railways may be worked, and, by sub-s. 5, defines the "area of protection" in relation to any seam of minerals, dividing it, in certain given circumstances which existed in the present case, into an inner and an outer area of protection. Section 78A deals with compensation for leaving minerals unworked when, after the mine-owner has served on a railway company notice of intention to work, the company has served a counter-notice sterilizing minerals in a specified area, and it provides that, in default of agreement, the compensation is to be determined by arbitration. Section 79 gives to a mine-owner who has served on a railway company notice of intention to work minerals power to work them if the company has served no counter-claim within thirty days. Section 79A deals with the liability of a mine-owner in respect of authorized workings.

The plaintiffs, while working their seam, were approaching a tunnel belonging to the defendants, and, on January 24, 1940, served under s. 78, sub-s. 1, a notice to work the coal lying under the area of protection comprising the defendants' railway and works. On December 30, 1940, the defendants served a counter-notice in respect of part of their railway and works comprised in that notice, thereby sterilizing the coal comprised in the counter-notice area. By this summons the plaintiffs asked (1.) whether, on the true construction of s. 15 of the Act of 1923, particularly ss. 78 and 78A therein included, in assessing the compensation payable by the defendants to the plaintiffs under the counter-notice, any account ought to be taken of the possible contribution for which the plaintiffs might in the future have become liable under s. 79A if the coal covered by the counter-notice had been worked and the defendants' railway and works had been damaged by that working; and

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(1) [1943] Ch. 406.

(2.) whether, on the true construction of s. 15, the compensation ought to be assessed and paid at once or not until such time or times as the coal covered by the counter-notice would in the ordinary course have been worked, or at some, and what, other period, and, if the assessment ought to be made at once, whether or not, in making it, a proper rate of discount ought to be applied to the estimated figures of the plaintiffs' loss per ton of coal by reason of the coal being sterilized. Morton J. held (1.) that, in assessing the loss caused by minerals being left unworked pursuant to the counter-notice, account must be taken of the liability imposed on the mine-owners by s. 79A to contribute towards the expenses of making good any damage to the railway or railway works which would have been caused if the minerals had been worked; (2.) that compensation was assessable and payable without delay after the service of the counter-notice and in respect of the whole sterilized minerals, but, in making the assessment, account should be taken of the period or periods in the future when the sterilized minerals would, but for the counter-notice, have been worked, and a proper rate of discount should be applied to the estimated value of the minerals. The plaintiffs appealed against Morton J's decision on the first point.

Macaskie K.C. and *Jopling* for the plaintiffs. Sections 78 and 78A deal with the right of a railway company by counter-notice to have minerals sterilized in a specified area near the railway works and the method of assessing the compensation to which the mine-owner becomes entitled in consequence, while s. 79 gives the mine-owner the right to work minerals comprised in his notice in respect of which no counter-notice is received and s. 79A imposes on him a liability to contribute towards the expenses of making good any damage to the railway and railway works caused by the working. The two groups of sections have entirely different subject-matters, and the compensation that would have become payable by the mine-owner for damage to works of the railway company had the sterilized coal been worked cannot be taken into account by way of deduction in computing the compensation payable to the mine-owner in respect of the value of the sterilized coal. Under the original Act of 1845 the mine-owner could work anywhere except where a railway company bought minerals in a prescribed area under s. 77 and paid compensation under s. 78, and the limit of the area was prescribed when there was no deep mining: see *Great Western Ry. Co.* v. *Bennett* (1). The value of the minerals in the area was fixed at the price of the minerals, less the expense of working them: *Eden* v. *North Eastern Ry. Co.* (2). In *London & North Western Ry. Co.* v. *Howley Park Coal & Cannel Co.* (3) the difficulty of the prescribed area being too small was got over by recognizing the railway company's common law right to support outside that area. This, in effect, meant that the mine-owner had to leave coal unworked without payment outside the prescribed area, and it was to meet this difficulty that s. 15 of the Act of 1923 was passed. The position of the royalty-owner was there first taken into account. That section gave the railway company a right to sterilize coal over a wider area (ss. 78 and 78A), and in respect of coal worked outside that area only imposed on the mine-owner a liability to contribute to the cost of making good damage caused by working the coal (ss. 79 and 79A). The liability imposed on the mine-owner to contribute can only be the price paid for liberty to do that which he could not previously have done in an area in which support had not been purchased by the railway company. It can have no bearing in fixing the price paid for sterilized coal: see in this respect s. 79A, sub-s. 3. If it did, the royalty-owner would get his compensation in full while the mine-owner suffered deduction of notional compensation payable on working coal he can never work. It was never suggested under the original sections in the Act of 1845 that the price payable by the railway company was to suffer any deduction in ascertaining the value of the coal sterilized, except the cost of working it. A liability imposed in respect of an area which is not the subject of a counter-notice cannot apply to the area where coal is sterilized by the counter-notice. The counter-notice carves out an entirely separate area.

Sir Walter Monckton K.C., *S. Pascoe Hayward* and *J. B. Herbert* for the defendants. It would be a strange result if the mine-owner received in respect of sterilized coal a larger sum than if there had been no counter-notice. Without the counter-notice the mine-owner could only realize the price received for the coal, less the cost of working it and the compensation he would have to pay for letting down the railway works. Why should it not be the same in respect of the minerals sterilized by counter-notice? The fact that the counter-notice covers, not only the inner area, but also an outer area in respect of which there is an artificial statutory reduction of compensation to one-third of the value of the coal is not a ground for introducing artificiality into the calculation of the loss. The definition of "value," quoted by Lord Macnaghten in *Eden* v. *North Eastern Ry. Co.* (1) from Lord Penzance in *Smith* v. *Great Western Ry. Co.* (2), was given at a time when there was no outlay of the kind mentioned in s. 79A. There is nothing in the language of that or any other case to justify the exclusion of a proper item of outlay in arriving at the value of the coal sterilized. Under s. 78A, sub-s. 4, it is the "compensation for the loss caused" which has to be ascertained and not as it was in the original section "compensation for such mines." "Loss" cannot mean more than what is lost by leaving the sterilized minerals unworked. [They referred to *Bwllfa and Merthyr Dare Steam Collieries (1891), Ld.* v. *Pontypridd Waterworks Co.* (3) and *Livingstone* v. *Rawyards Coal Co.* (4).] The compensation payable to the mine-owner under s. 78A, sub-s. 1, has to be calculated by reference to the value of the minerals per ton in both the inner and outer area and not by reference to their value in each area separately. In respect of the outer area only one-third of the price per ton is payable. This meets any suggested difficulty in reducing the values by the compensation that would have become payable for any injury to the railway works had the sterilized minerals been worked. There is nothing making it necessary to ascertain the value of the minerals by regard to the inner area only. An arbitrator would be able to calculate the notional compensation that would become payable if the sterilized minerals were worked and caused damage to the railway works, although, in fact, that would never happen. In any case to which s. 79A applied that inquiry would have to be made, and it should be possible, though less easy before the event has happened that would normally make it necessary. There is nothing making it impossible to calculate the compensation payable to the mine-owner under ss. 78 and 78A in the manner suggested.

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(1) (1867) L. R. 2 H. L. 27.

(2) [1907] A. C. 400.

(3) [1911] 2 Ch. 97; [1913] A. C. 11.

(1) [1907] A. C. 400, 407.

(2) (1877) 3 App. Cas. 165, 185.

(3) [1903] A. C. 426.

(4) (1880) 5 App. Cas. 25.

[They also referred to *Rugby Portland Cement Co.* v. *London and North Western Ry. Co.* (1).]

Macaskie K.C. replied.

Cur adv. vult.

March 15. LORD GREENE M.R.: The judgment which I am about to read is the judgment of Luxmoore L.J. and myself.

The question raised by this appeal is one of considerable difficulty, the more so as the careful judgment of Morton J. presents what at first sight appear to be convincing reasons for a decision in favour of the defendants. The question turns on the true interpretation of certain provisions of the Mines (Working Facilities and Support) Act, 1923, which introduced radical changes in the law governing the mutual rights and obligations of railway companies and mine-owners in respect of minerals lying under or adjacent to railway lines and railway works. Previously to the passing of that Act these rights and obligations were governed in part by the mineral code contained in ss. 77 to 85 of the Railways Clauses Consolidation Act, 1845, and in part by the common law. The effect of the code may be summarized as follows. By s. 77 a railway company on a purchase of land did not acquire the minerals thereunder (save such as were necessary for the construction of its works) unless they were expressly purchased. It thus avoided the necessity of paying for the minerals when it purchased the land and was able to defer payment for the support required until such time as the minerals were about to be worked. When that time arrived the code gave to the railway company the right to protect itself against damage to its railway or works which might be caused through working the minerals within a prescribed distance (normally 40 yards) therefrom. By s. 78 a mine-owner proposing to work the minerals within this area of protection was put under the obligation to serve a notice of his intention on the company, and, if the company considered that the proposed working would damage its works and was willing "to make compensation for such mines or "any part thereof" to the mine-owner, the latter was forbidden to work the mines. The compensation, if not agreed, was to be settled, as in other cases of disputed compensation, i.e., under the Lands Clauses Consolidation Act, 1845. Under this procedure the railway company did not become the owner of the minerals. They were merely sterilized. The "compensation" payable was the full value of the minerals required to be left unworked, namely, what they would have sold for if worked, less the cost of working them: *Eden* v. *North Eastern Ry. Co.* (1). The code made no provision for compensation to the royalty-owner. By s. 79, if the company was not willing to treat, the mine-owner was entitled to work the minerals, and, provided he did so in a proper and usual manner, he was under no liability for any damage which might be caused to the railway works.

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(1) [1908] 2 K. B. 606.

Two points must be borne in mind. First, the code gave the railway company no opportunity of protecting itself against the results of mining outside the 40 yards limit. This, no doubt, was due to the fact that the danger of deep mining in its effect on the surface of neighbouring land situate at some distance from the scene of the operations was not sufficiently appreciated in the year 1845. Secondly, not only did the code impose no liability on the mine-owner to contribute to the cost of repairs to railway works necessitated by mining outside the 40 yards limit, but, if the railway company did not exercise the right to sterilize the minerals within the 40 yards limit, the mine-owner incurred no liability to contribute to the cost of repairs necessitated by working them provided they were worked in a proper and usual manner. The common law, however, came to the assistance of the railway company in the first of these two matters. In *London & North Western Ry. Co.* v. *Howley Park Coal & Cannel Co.* (2) it was decided that a railway company enjoyed the common law right of lateral support for its railway from mines lying outside the 40 yards limit, and was, accordingly, entitled to restrain the mine-owner from working them in such manner as to withdraw that support. The result of this decision was, no doubt, a serious matter for mine-owners since they found themselves prevented from working their adjacent minerals without having the right to receive compensation as was the case under the code in respect of minerals within the 40 yards area of protection. It was said in that case that the mine-owner could have required his obligations in respect of minerals outside the 40 yards area to be taken into account in fixing his compensation under the original notice to treat when the railway company acquired its surface lands, but this, so

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far as we can see, would only have been the case if the surface acquired and the minerals belonged to the same person, and, in any event, it afforded poor consolation to the mine-owner to whom in the majority of cases it could give nothing but a feeling of regret for a lost opportunity.

The situation thus created was one which merited and received the attention of the legislature. We are told that the new code for "Minerals under railways" which is contained in part II of the Mines (Working Facilities and Support) Act, 1923, embodies a compromise effected by the parties interested. The draftsmanship certainly supports this view, but, if it be correct, it cannot affect the question of construction with which we are concerned. This much, however, it is permissible to say, that the legislature, for reasons which appeared to it to be sufficient, imposed a new code under which each party lost certain of the privileges which it had previously enjoyed and received privileges to which it was not previously entitled. The new code so enacted begins by extending the area of protection beyond the 40 yards specified in the old code. The new area of protection is an area extending from the railway works to a point equal to one-half of the depth of the seam proposed to be worked, i.e. the greater the depth of the seam the wider the area of protection. With regard to this area the old requirement as to notice of intention to work is applied and the railway company is empowered to serve a counter-notice specifying the minerals comprised in the notice which it requires to be left unworked. The company is to pay compensation in respect of the minerals so specified, but the rate of compensation is to be different according as the specified minerals are within or without a distance of 40 yards from the works. The rate in the latter case is to be one-third of the rate in the former case. The exact language of these provisions for compensation we will deal with later. For the moment all that we wish to do is to point out that the mine-owner is given a right which he did not have before, namely, the right to receive some compensation in respect of so much of the specified minerals as lie outside the old 40 yards area of protection which he is prevented from working. Incidentally, the company obtained the benefit of having a notice of intention to work minerals lying outside the old 40 yards area of protection. A new feature of the compensation provisions is that compensation is to be payable to the royalty-owner in respect of specified minerals which are sterilized by the counter-notice. This right of the mine-owner to receive and the obligation of the company to pay compensation in respect of specified minerals lying in the outer area of protection, i.e. the area outside the 40 yards, is the principal benefit received by the former and the principal detriment suffered by the latter under the new code. Under s. 79 the mine-owner is given the same right to work in a proper and usual manner (but not otherwise) the minerals comprised in his notice in respect of which no counter-notice has been served which he enjoyed under the old code in respect of similar minerals within the old area of protection. Section 79A confers an entirely new right on the company and imposes an entirely new obligation on the mine-owner. It may fairly be regarded as providing the company with a quid pro quo for the detriment which it has suffered in the matter of compensation as already explained. Under that section a mine-owner who works minerals in the new extended area of protection which he is entitled to work as not being comprised in a counter-notice is liable, even if his working is conducted in a proper and usual manner, to contribute towards expenses incurred by the company in making good damage to any railway works other than " protected works," i.e. works comprised in a counter-notice. The right to call for a contribution so conferred on the company is obviously an important one. It enables the company in a suitable case to limit the area of the minerals which it requires to sterilize and so to limit the compensation which it will be called on to pay. This it can do in any case where it is prepared to take the risk of damage to a railway work rather than pay compensation, for it will know that, if damage does occur, part of the cost of repairing it will be thrown on the mine-owner. It will be necessary at a later stage to examine these provisions in greater detail. It is sufficient to note here (1.) that there are scales laid down for ascertaining the percentage of the contribution to be made by the mine-owner with an upward limit to be determined in each case in accordance with certain elaborate directions ; (2.) that provision is made enabling the mine-owner to make deductions from royalties not exceeding in amount one-third of his contribution.

It is convenient at this point to state briefly what are the contentions of the parties to this appeal. The defendants contend that, in arriving at the compensation to be paid by them in respect of the specified minerals in their counter-notice, account should be taken of the fact that, if the counter-notice had not been served, the mine-owners would have been liable to contribute to the making good of any damage caused by working them. This potential liability, it was said, made the minerals less valuable in the hands of the mine-owners, and the arbitrator must, accordingly, form an estimate of the risk and make an appropriate deduction from the compensation, making, of course, an allowance in respect of that part of the liability which the mine-owners would be able to pass on to the royalty-owner. The mine-owners, on the other hand, contend that the provisions for compensation to be paid by the railway company and the provisions for contribution to be made by the mine-owners are separate and distinct; that the former apply only in regard to specified minerals and that the latter apply only in regard to minerals that are not specified; that the liability to make contribution only arises where damage has, in fact, occurred; and that the possibility of its occurring is not an element which can be taken into account in fixing the compensation to be paid in respect of specified minerals.

To arrive at a solution of the problem thus raised it is necessary to examine in some detail the language of both sets of provisions. We will begin with those relating to compensation.

1. The obligation to pay compensation is expressed in s. 8, sub-s. 4, in the following words: "the company shall pay "compensation to the mine-owner and the royalty-owner "(if any) for the loss caused by the specified minerals being "left unworked." Attention is drawn by counsel for the defendants to the words "compensation for the loss caused" as contrasted with the words in the old code "compensation "for such mines." This change in language, it was said, was due to the introduction of a new element in the computation of compensation which was not present under the old code, namely, the potential liability of the mine-owner to contribute under s. 79A. We cannot give any such force to this change in language. The more probable explanation of the change appears to us to be that words had to be found which would cover, not only the case of the mine-owner, but also the new case of the royalty-owner. The words "compensation for "such minerals" would have been inappropriate to the case of the royalty-owner, and, accordingly, a phrase was selected which would cover both cases.

2. Section 78A, sub-s. 1, provides that the compensation shall be determined by arbitration and the proviso to that sub-section lays down rules for ascertaining the compensation payable to the mine-owner and the royalty-owner "so far as such "compensation is payable in respect of the value of specified "minerals." Now, the basis of compensation under the old code was that of the value of the minerals affected, namely, what they would have sold for if worked, less the cost of working them: *Eden's* case (1). The use of the word "value" in s. 78A, sub-s. 1, of the new code does not suggest that any departure from the old basis of compensation is intended or that a new factor, unknown under the old code, is to be taken into account. The potential liability to contribute cannot affect the value of the minerals when brought to market, nor, as it seems to us, can it properly be described as part of the cost of working within the meaning of *Eden* v. *North Eastern Ry. Co.* (1). It is worth pointing out that if (as is contemplated by the language of sub-s. 5 of s. 78 of the new code) the area of protection in any given case does not extend beyond the old 40 yards limit the defendants would, if their contention is correct, pay a less sum in compensation under the new code than they would have paid in respect of the same minerals under the old code.

3. Under para. (ii.) of the proviso the compensation payable to the mine-owner is to be expressed as a sum per ton, the rate in the case of minerals under the outer area of protection being one-third of that "awarded" in the case of minerals lying under the inner area of protection. The more natural meaning of this provision appears to us to be that the arbitrator is to ascertain the tonnage: see para. (iv.); within each of the two areas of protection. He is then to determine the value of the minerals within the inner area expressed as a rate per ton. Lastly, he is to apply one-third of that rate to the tonnage within the outer area. On this basis no separate ascertainment of the value of the minerals in the outer area falls to be made. All that it is necessary to do is to ascertain their tonnage figure and apply to it one-third of the rate per ton which has been ascertained on a valuation of the minerals within the inner area. If this view is correct it will be impossible to make the allowance claimed by the defendants in respect of the potential liability to contribute and at the same time carry out the directions contained in para. (ii.). To ascertain what allowance

(1) [1907] A. C. 400.

ought to be made (assuming that it is to be made) it will be necessary for the arbitrator to form an estimate of the damage likely to be caused by working both sets of minerals. If the value of the minerals within the inner area is to be affected by the potential liability in respect of those minerals the rate per ton applicable to those minerals will be correspondingly reduced. If the interpretation which we favour is the correct one, it would follow, on the defendants' argument, that the compensation payable in respect of minerals within the outer area would be reduced by reason of the potential risk of damage caused by working those within the inner area. This result might well be unjust since the effect of working the former might be widely different from that of working the latter. It was, however, argued that this interpretation is not the correct one. It is said that the proper procedure is to ascertain the total tonnage in the two areas, value the total so found, making a proper allowance for potential contributions to be occasioned by the workings in both areas, reduce the figure so arrived at to a rate per ton, and award compensation at the full rate in the case of minerals within the inner area and one-third of the full rate in the case of minerals within the outer area. It does not appear to us that this method complies with the instructions contained in the paragraph. It has the effect of attributing to the minerals within the inner area a value the amount of which is necessarily affected by the contribution to be expected by reason of damage caused by workings in the outer area and vice versa. It does not arrive at the true value of the minerals in either area since that could only be ascertained by valuing the minerals in each area with reference to the damage to be expected from their working alone without regard to damage to be expected from working the minerals in the other area. The damage in respect of which contribution is to be made under s. 79A is damage done to individual works. It may very well be that the works protected by a counter-notice will be of various kinds and scattered over a considerable area. The damage to be apprehended in the case of any one of these works may well be attributable wholly to workings in the outer area or wholly to workings in the inner area or partly to one and partly to the other. We do not see how with any pretence of logic the present claim of the defendants can be made to fit in with the scheme for fixing compensation which is contained in sub-s. 2 of s. 79A.

4. Proviso (iii.) to s. 78A, sub-s. 1, deals with the compensa-

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tion in respect of the value of specified minerals which is to be paid to the royalty-owner. It is to be based on "the amount "which would have been received from time to time by way of "royalty in respect of the specified minerals if they had been "worked out in the ordinary course." The rate of royalty in the case of minerals within the inner area is to be the contractual rate, while the rate in the case of minerals within the outer area is to be one-third of that rate plus one-third of a penny per ton. According to the argument for the defendants, the royalty-owner will never receive compensation at the rates thus specified in any case where the working of the specified minerals would have led to damage to a railway work. The reason for this is that, under s. 79A, sub-s. 3, if the specified minerals had been worked and the mine-owner had become liable to pay contributions, the royalty-owner would have had to suffer a deduction from "any royalties then or thereafter "becoming due from him (the mine-owner) to the royalty-"owner under the lease" with a complicated upper limit to the amount to be deducted in certain cases. This deduction, it is said, would have fallen to be made if the minerals had been worked out "in the ordinary course," but this, if we understand the sections rightly, would lead to a most remarkable result. The amount of the deduction from royalties which is permitted under sub-s. 3 of s. 79A is the same whether the damage done is caused by workings under the inner or the outer area. It is a deduction from the royalties "payable under the "lease," but the compensation payable to the royalty-owner varies according as the specified minerals lie within the inner area or within the outer area. An illustration will explain our difficulty. Let us assume that the arbitrator finds that the damage to be apprehended to a particular work would, if the minerals had been worked out "in the ordinary course"—reading those words as the defendants read them—have involved a contribution by the mine-owner of 150*l.*, and that, in the opinion of the arbitrator, such damage would have been attributable in equal shares to the working of the minerals in both areas. Let us further assume that the contractual royalty is 6*d.* per ton. On the argument for the defendants the compensation payable to the royalty-owner under s. 78A, sub-s. 1, proviso (iii.), would be, in the case of the minerals within the inner area (6*d.* x tonnage) less £$\frac{75}{3}$ and in the case of the minerals within the outer area (3*d.* x tonnage) less £$\frac{75}{3}$ In other words, the deduction from the royalty-owner's com-

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pensation in the one case is only one half of what it is in the other.

5. Having regard to the remarkable results which would follow if the contention of the defendants were correct we cannot bring ourselves to believe that, if the legislature had intended those results, it would not have said so in express terms. The only express words which the defendants can point to as importing such an intention are the words in s. 78, sub-s. 4, already discussed, namely, " compensation for the loss " caused by the specified minerals being left unworked." These would indeed be pregnant words if they carried the consequences imputed to them by the defendants.

We will now turn to the provisions relating to contribution. 1. An examination of s. 79A confirms us in the view that the contention of the mine-owners is the correct one. Under that section the mine-owner is to contribute " towards the expenses " properly incurred, or to be incurred, by the company from " time to time thereafter (i.e. after the working) in making good " any damage caused by such working to the railway or works " of the company (not being protected works comprised in any " counter-notice relating to such area of protection)." According to this language, the liability arises when and only when damage is actually caused. Moreover, the damage in respect of which contribution can be claimed is, as we have already said, damage to individual works. According to the argument for the defendants, the arbitrator will have to form an estimate of the damage which would have been occasioned to each of the protected works comprised in the counter-notice if the specified minerals had been worked. This estimate he will have to form with regard to each individual work, be it a line of railway, a signal box, a plate-layer's hut, a tunnel or a goods siding. Moreover, he would have to decide with regard to each work whether the damage would have been caused by working the minerals within the inner area or by working those within the outer area. He would also have to form an estimate of the time which would have elapsed before the effect of the workings came to the surface and caused damage to the railway work. In the case of deep workings this might be a matter of years, but he would have to form an estimate of how long it would take since he would have to assess the present value of a hypothetical contribution to be made at some future date. It appears to us to be in the highest degree unlikely that the legislature would have imposed such a task on the arbitrator without express language to that effect. The effects of mining operations on buildings on the surface of superjacent or adjacent land is notoriously capricious and impossible to forecast with any certainty. It may, no doubt, be possible to say that damage will be caused, but something more is needed since it is the extent of that damage to an individual work and the cost of making it good that have to be assessed. We may quote here two passages from the Second and Final Report of the Royal Commission on Mining Subsidence (Cmd. 2899, dated June 23, 1927), which, Sir Walter Monckton agreed, describe with accuracy the uncertainty of the incidence of subsidence. In para. 7 it is said: "The amount of sub-"sidence is, therefore, not quantifiable and can scarcely be "predicted with any accuracy, even when all the conditions "are tolerably well ascertained." In para. 9 it is said: "The "precise amount of subsidence cannot be determined before-"hand, and the surface area over which it will extend, the "evenness or unevenness of the depressions, the period within "which the process will begin and end—all these things turn "upon conditions and circumstances which in many instances "are not capable of forecast." These statements were made some four years after the passing of the Act, yet we are asked to assume that, in spite of this uncertainty, the arbitrator is to perform the task, not merely of forecasting generally that damage will occur and when it will occur, but that damage of an ascertainable amount will occur to specific works and buildings. In the present case we are told that the parties have agreed on a figure for the allowance to be made in respect of potential contribution if such an allowance is to be made, but this affords no answer to the difficulty. It merely avoids it. It may very well be that in some cases the damage to be apprehended can be measured with sufficient precision to enable the parties to arrive at a reasonable compromise, but an arbitrator must decide in accordance with the strict provisions of the Act, and the fact that in this particular case, and, perhaps, in other cases, the parties are able to come to an agreement is not a relevant matter to consider when the true construction of the Act is involved.

2. The task of the arbitrator, however, would not end here. There are elaborate provisions for fixing an upward limit to the contribution to be made. We will not occupy time in referring to them at length. Suffice it to say that the limit is fixed by reference to the tonnage of minerals, gotten or ungotten, in

any seams lying under an ascertained area, whether they be the seams which are proposed to be worked at the date of the notice or not. In the second schedule, where rules are laid down for determining what that area is to be, it is provided (para. 2) that "the area shall extend longitudinally for a "distance co-extensive with the part of the railway or works "upon which expenditure has been incurred in making good "the damage, together with a length beyond that distance at "either end thereof equal to one-half of the mean depth of the "seam or seams in question." This appears to us to mean that the area can only be ascertained by reference to damage which has actually occurred and cannot be ascertained until it does occur.

These considerations drive us to the conclusion that the liability to make a contribution comes into existence when and only when damage occurs and cannot be regarded as having a potential existence before it occurs. The provisions of the Act relating to compensation and those relating to contribution appear to us to be quite separate and distinct, and the existence of the latter cannot be taken as governing the measure of the former. The appeal is allowed, with costs here and below.

MacKinnon L.J. read the following judgment. If, at common law, A. was the owner of the surface of land, with a right of support to the surface and of a building on it, and B. was the owner of minerals beneath that surface, and if they made an agreement by which B. was to abstain from working the minerals beneath A.'s land, and A. undertook to compensate B. for the loss he sustained by losing the value of the minerals he would, but for the agreement, have mined and sold, how would B.'s compensation be estimated? If B. formulated his claim he might say: "But for our agreement "I should have won from under your land so much coal, "which I should have sold for £X. The expenses I should "have incurred in raising and marketing this coal would "have been £Y. Therefore I have lost £X — Y. Please pay "me that." A. might reply: "There is another factor to be "taken into account. At common law I have a right to "support. If, in the absence of our agreement, you had "worked the coal under my land you would have damaged "my house by subsidence, and I could get damages from you "for that. Either you would have had to leave a pillar to "support my house (in which case the coal in that would

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"have no value to you) or you would have had to pay me £Z "as damages. Therefore £Z is another factor to put on the "debit side of the calculation, and in truth the value of the "unworked coal to you is £X — (Y + Z)." If, in the earliest days of railways, A. was a railway company and B. the owner of subjacent minerals, and they made the suggested agreement, no doubt the railway company would be justified in contending that this factor of £Z was an item to be set on the debit side against the £X factor in B.'s calculation, but since 1845 the rights and liabilities of a railway company and the owner of subjacent minerals have depended to a large extent on statute and not only on common law. Section 78 of the Act of 1845 created a statutory equivalent to an agreement between A. and B. by which B. should abstain from working coal for 40 yards on either side of A.'s railway line and B. should compensate B. for the loss he thereby sustained. Could A. contend that under the provisions for compensation under s. 78 the proper formula was not £X — Y, as B. said, but was £X — (Y + Z) ? Clearly not ; for by s. 79 it was provided that, if A. did not cause s. 78 to operate, B. might work the mines "in a proper and necessary manner," and, if damage was done to the railway by improper working, B. should be liable for the cost of repair. On the rule of expressio unius it is manifest that the £Z factor would only arise if B. worked improperly, and not from A.'s common law right, and as A. could not contend that improper working by B. must be anticipated and its effects estimated, clearly what I have called the £Z factor could not be taken into account in estimating the compensation payable by A. to B. under s. 78. *London & North Western Ry. Co.* v. *Howley Park Coal & Cannel Co.* (1) decided that in respect of land outside the 40 yards region dealt with by s. 78 A.'s right of support, and right to damages if that support were withdrawn, remained as at common law, unaffected by ss. 78 and 79. If A. was minded to increase the area of sterilization of underlying coal, and agreed with B. that B. should abstain from working, not only for the 40 yards, but for a further 100 yards beyond the 40, and that A. would compensate him for the loss of all the coal in this enlarged area, could A., when he and B. came to discuss the amount to be paid, say to B. : "It is true that under "ss. 78 and 79 I cannot ask you to debit in the account the "£Z factor as regards the 40 yards area, but I can do so as

(1) [1911] 2 Ch. 97.

" regards the coal in the hundred yards area added by our " agreement, for in that area my rights are not affected by " s. 79, but depend on the common law." (One must assume that the £Z factor as to coal in the hundred yards area is presently estimable, though, I confess, I cannot imagine that it could be done except by an assessor who was omniscient as to past, present, and future.) That is a difficult question. I do not think it is necessary to attempt to answer it, but it may afford a consideration to be borne in mind in confronting the still more difficult problem that confronts us under the Act of 1923. In that problem we have no concern with either the common law or any agreement between the parties. The problem depends solely on the construction of what I believe must be the most obscurely complicated piece of legislation in the entire statute book.

The Act of 1923 did four things :—(1.) the royalty-owner, who was ignored in the Act of 1845, is brought in as a possible party to arbitrations ; (2.) the 40 yards area of sterilization is continued as the " inner area " of protection, but there is added to it an outer area of protection depending on the depth of the seams beneath ; (3.) the mine-owner is to be compensated for the loss of his minerals that are sterilized, but by a purely arbitrary provision he is to have full compensation in the inner area, but only one-third of that in the outer area ; (4.) if the minerals are not sterilized by a counter-notice and may be worked, the liability of the mineral-owner for damage through subsidence caused by improper working is (by the new s. 79, sub-s. 2) continued, as in the Act of 1845, but there is a wholly new provision (by s. 79A) whereby the mineral-owner is to a certain extent to be liable for the cost of repairing subsidence damage caused by his proper working. This " certain extent " is a percentage of the cost of repairing such damage calculated according to the amazingly complicated terms of s. 79A and the first and second schedules. This quantification of his liability is, again, purely arbitrary. A counter-notice having been given, the mineral-owner is, under s. 78, sub-s. 4, to be entitled to compensation. There seem to be two, if not three, factors to be taken into account on the credit side of his account :—(1.) impliedly, the price which he would realize by selling the coal, less the cost of winning it and bringing it to market ; (2.) expressly, under s. 78A, sub-s. 2, the increased cost to him of working other minerals not specified in the counter-notice; and (3.) under s. 81 and sch. III., the additional expenses for severance; which is to be estimated on yet another purely arbitrary basis of calculation. It is, no doubt, because of the existence of (2.) (and, perhaps, of (3.)) that s. 78A, sub-s. 1, uses the words "so far as such compensation "is payable in respect of the *value* of the specified minerals."

The question now raised is as to the proper factors to be taken into account in estimating the "value of the specified "minerals" to the mine-owner. On the credit side, without doubt, must be set down what he would realize for the coal when won. On the debit side, beyond doubt, must be set the expenses of working it, and getting it to market. This means £X — Y in the formula I used at the beginning. The defendants allege that there is a further item to be set on the debit side, the equivalent of what I specified as £Z, and this item they allege is the prospective liability of the mine-owner under s. 79A and the first and second schedules if, in the absence of a counter-notice, he had worked the specified minerals. It seems to be assumed that this hypothetical liability can be ascertained, and reduced to a figure per ton of coal in the inner area and to a third of that figure per ton of coal in the outer area. It is even asserted that that figure has been agreed in this case between the parties. I am not impressed by this. The alleged agreed figure, presumably so much per ton of the coal in the inner area and so much per ton in the outer area, must have been arrived at by a purely arbitrary compromise based on conflicting guess-work. As I said earlier, the rights and liabilities of these parties depend solely on the provisions of this Act of 1923. There is no question of the common law or contract. The defendants must establish that solely by reason of the provisions of the Act they are entitled to have this disputed factor taken into account in estimating the compensation payable by them in respect of the specified minerals. There has not been, and cannot be, any suggestion that any words in the Act expressly so provide. It must, therefore, be a matter of implication, and so far as I can see, that implication must be derived solely from the word "value" in the phrase "so far as such compensation is "payable in respect of the value of specified minerals." The basis of the argument for the defendants is the proposition, in general terms: "Admittedly 'value' means the price to "be realized by the tons of coal less the cost of working them. "Section 79A creates a new and special item in the cost of "working. Therefore, that item must be taken into account." If s. 78A had defined "the value of specified minerals" as being "the value they would have if, being minerals not "affected by a counter-notice, they were worked pursuant to "s. 79 and s. 79A," this might be the result, despite the practical impossibility of estimating the hypothetical liability under s. 79A, but s. 78A makes no such provision, nor any reference, unless by implication, to ss. 79 and 79A as bearing on "the value of specified minerals." Hence the counter argument of the plaintiffs that ss. 78 and 78A are complete in themselves as dealing with minerals specified in a counter-notice, while ss. 79, 79A and 79B are also complete in themselves as dealing with minerals not affected by a counter-notice, so that the meaning of "value" in s. 78A is not to be modified by reference to ss. 79 and 79A.

After long hesitation over the most obscure and difficult problem with which I have ever been confronted, I have come to the conclusion that the plaintiffs are right. The Master of the Rolls, whose judgment I have read, has indicated various reasons for this conclusion and with them I agree. I will not repeat them, but perhaps add the consideration that under s. 78A there are to be separate arbitrations between railway company and mine-owner, and between railway company and royalty-owner: whereas under s. 79A, sub-s. 6, there is to be only one arbitration between railway company and mine-owner, but the royalty-owner is to have notice thereof and to be entitled to appear and be heard. This seems also to point to the conclusion that the two sets of sections are independent and self-contained and are not to be treated as inter-related. I prefer, however, to rest my conclusion on the simpler and broader ground that, in estimating "value" under s. 78A, it is not possible to estimate the prospective and hypothetical liability under s. 79A. The arbitrator who is estimating "the value of specified minerals" under s. 78A must do so *now*. The damage to the railway or works for which, under s. 79A, contribution is to be made by the mine-owner must occur in the future—it may be a distant future. Who can tell what will be "the works" of the railway company to which at that future date damage may be caused by the working of the minerals? In this case it happens that "the "Mapperley Tunnel" is the only "protected work" specified in the counter-notice given under s. 78, sub-s. 2, but, if the principle claimed by the defendants is to apply, any of the works or buildings above the protected area may be damaged by working coal and so be a subject for contribution by the mine-owner under s. 79A. When the arbitrator assesses *now* the "value" under s. 78A these works may be (e.g.) a railway station, signal boxes, sidings, a warehouse. Any of these may be destroyed a month hence by German bombs. The station, or the signal box, may be out of date and require shortly to be rebuilt. No one can know what will be "the "works" above the protected area at the future date (possibly remote) when subsidence from the mining below may cause damage to them. The defendants have not attempted to say that the mine-owner's possible liability under s. 79, sub-s. 2, for damage caused to the railway works by improper working is also a factor to be taken into account in assessing the "value "of the specified minerals," no doubt because no arbitrator can forecast the likelihood of any such improper working. I think that it is equally impossible for an arbitrator to forecast what will be the works that at a future date may be damaged by the mining beneath them, quite apart from the difficulty (which I should suppose almost amounted to impossibility) of forecasting what damage by such working is likely to be caused to *any* works. In the result I think this appeal should be allowed, with costs here and below.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co.; W. H. Hanscombe.*

H. C. G.

In re MILLING'S SETTLEMENT.

PEAKE *v.* THOM.

MORTON J.
1944
Mar. 27, 28.

Settlement—Power of appointment among daughters—Appointment of shares of daughters dying "without leaving issue" to other daughters and their issue—"Issue"—Inclusion of children who had died after attaining a vested interest leaving mother surviving.

By a settlement, made in 1877, M. settled property in favour of his six daughters by name, upon such trusts as he should by deed or will appoint, and, in default of appointment, the trustees were, after M.'s death, to pay the income of one-sixth part of the property to each daughter for her life and subject thereto to hold the capital for her children who should attain twenty-one or marry. In 1887,

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by a codicil to his will, M. exercised the power and appointed that the share of any daughter dying unmarried or, if married, " without leaving issue " should be divided equally among his other daughters who should be living at his death and the issue of any of them who should be then dead. In 1942 a daughter died who had been married and had two sons both of whom attained twenty-one and predeceased her :—

Held, that the object of the appointment, properly construed, was clearly to supply the lack of an accruer clause in the settlement, and prevent a resulting trust to M. of the share of any daughter which would be undisposed of by her death without issue, and, therefore, the expression " without leaving issue " must be construed " without having had a child who attained a vested " interest," with the result that the estates of the two sons who predeceased their mother were entitled to her share between them.

ADJOURNED summons.

By a settlement, dated February 22, 1877, the settlor, John Milling, conveyed land to trustees on certain trusts, and provided that after a specified period the trustees should pay the rents and profits of the premises to himself during his life. The settlement then proceeded : " And from and " after his decease the said trustees or trustee shall stand " seized of the said premises hereinbefore expressed to be " hereby granted and the rents and profits thereof in trust for " all or such one or more exclusively of the others or other " of the six daughters of the said John Milling [Elizabeth, " Jessie, Mary, Martha, Evelyn and Ada] at such age or time or " respective ages or times for such estate or estates in such " shares and with such future and executory or other trusts " for the said daughters or some or one of them with such " provisions for their respective maintenance education and " advancement either at the discretion of the said trustees or " trustee for the time being or of any other persons or person " and upon such conditions with such restrictions and in such " manner as the said John Milling shall by deed with or " without power of revocation and new appointment or by " will or codicil appoint." The power of appointment only extended to appointments in favour of the daughters and did not, as usual, give power to make appointments in favour of the children or issue of the daughters. The settlement proceeded : " And in default of such appointment and so " far as no such appointment shall extend the said trustees " . . . . shall pay the rents and profits of one equal sixth " part of the said premises hereby granted unto each of the

" said six daughters of the said John Milling and her assigns " during her life for her separate use . . . . without power of " anticipation and from and after the decease of each of the " said six daughters of the said John Milling respectively the " trustees . . . . shall stand seized of the one-sixth share " of the said premises the rents and profits whereof the same " daughter respectively was entitled to during her life as " aforesaid in trust for all the children of the same daughter " respectively who being sons or a son shall attain the age of " 21 years and being daughters or a daughter shall attain that " age or marry under that age and their respective heirs and " assigns as tenants in common in equal shares." There was no gift over of any kind in the event of a daughter dying without having any child who attained a vested interest. Thus, if the trust in default of appointment operated, there would be a resulting trust to the settlor in this event. After a hotchpot clause, there was the following proviso : " Provided " always and it is hereby further agreed and declared that " notwithstanding the trusts hereinbefore declared it shall be " lawful for each of the said daughters of the said John Milling " by deed or will or any codicil thereto to appoint that the " whole or any part of the rents and profits of the share the " rents and profits whereof shall be payable to her for her life " as aforesaid of the said trust premises shall be payable to " any husband of hers who may survive her for his life or for " any less period."

By his will, dated April 11, 1877, the settlor confirmed the settlement of February 22, 1877. On November 14, 1887, he made a third codicil in the following terms : " Whereas " in and by my said will I have confirmed the settlement " made by me on February 22, 1877, now therefore I hereby " revoke such confirmation and in pursuance of the powers " reserved to me in and by the said settlement and of every " other power in anywise enabling me in this behalf I appoint " that the share of any daughter of mine who shall die without " having been married or if married without leaving issue of " and in the trust funds referred to in the said settlement shall " be divided equally between and amongst the remainder of " my said daughters who shall be living at my decease and " the issue of any of them who shall be then dead."

The settlor died in 1887. Of the six daughters, Elizabeth married and died in 1917, leaving issue her surviving. Ada and Jessie died without having been married. Martha and

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Evelyn were still living, having married a Mr. Thom and a Mr. Robinson respectively. Evelyn had a son, the defendant, R. H. Robinson, who had attained the age of twenty-one years. Mary married a Colonel C. J. West and died in 1942, having had two sons who both attained the age of twenty-one, but predeceased their mother. The plaintiff, as trustee of the settlement, took out this summons, which asked (1.) whether, on the true construction of the settlement and the appointment made by the third codicil, the one-sixth share of Mrs. West devolved in equal fifths on Mrs. Thom, Mrs. Robinson and the estates of the three daughters, Elizabeth, Ada and Jessie, who were dead in 1942, or whether the said sixth share devolved as to one-half on the estate of Charles James West and as to the other half on the estate of Neville West, the two deceased sons of Mrs. West, to whose estates, in March, 1944, Colonel West had taken out letters of administration; and (2.) whether the defendant, R. H. Robinson, as the only child of Mrs. Robinson, had an absolutely vested interest in the Robinson share, or whether such interest was contingent on his surviving his mother and would be divested if he should predecease her.

Fawell for the plaintiff.

Pascoe Hayward for Mrs. Thom and Mrs. Robinson. There are two questions to be decided (1.) whether the appointment is valid and (2.) what it means. On the first point, there is a mixture of good and bad objects, for issue of daughters was not an object of the power and the appointment so far as it extends to such issue is invalid. Otherwise, it is perfectly good. On the second point, "without leaving children" literally means "without leaving children surviving their "parent." A rule, however, was laid down in *Maitland* v. *Chalie* (1), and followed in *In re Cobbold* (2), that in the case of a will the words "without having issue" ought to be construed "without having had issue to attain a vested "interest" where to construe them literally would have the effect of destroying a previously vested interest. The rule in *Maitland* v. *Chalie* (1), however, ought not to be extended to a case, like the present, of the exercise of a power of appointment. The object of giving a power of appointment is to enable the appointor, if he should so choose, to destroy vested

(1) (1822) 6 Madd. 243.

(2) [1903] 2 Ch. 299.

interests, i.e., the interests of those who take in default of appointment, and the rule, which is an artificial one, ought not to be extended in such a way as to allow that object to be defeated. Here the settlor, in exercise of his power of appointment, would take the matter into his own hands and destroy vested interests, and he has done so.

Wilfrid Hunt for Colonel West. This codicil cannot be interpreted literally. The settlor first dealt with the case of unmarried daughters. He had power to appoint their shares to the other daughters, and, in exercising that power, he was not divesting anyone of anything. In the case of a married daughter who had had no issue, or whose issue did not attain a vested interest, her share resulted to the settlor absolutely, and he could dispose of it by appointing it to the other daughters and the issue of any daughters who had died leaving issue. Then, by the hotch-pot clause whatever any daughter or child of a daughter took by appointment must be brought into hotch-pot in ascertaining the proper share. The result is that it would be practically impossible to work out the shares to be taken on a literal interpretation of the codicil. There was no gift over in the original settlement of the share of any daughter dying without issue, and the intention of the settlor was to supply that gift over, but he never intended to cut out the interest of children like the two sons of Colonel West who had attained a vested interest but died in their mother's life, time. On the true construction of the documents, the rule in *In re Cobbold* (1) ought to be applied. So to construe the codicil would divest nothing already vested. It would only fill the gap caused by the absence of an accruer clause in the settlement. The codicil should be interpreted so as to make it wholly valid. Under an express power in the settlement Mrs. West, by her will, appointed a life interest in her share to Colonel West. This appointment should be construed so as not to avoid that interest, which is clearly vested in possession.

A. C. Nesbitt for R. H. Robinson. This defendant is in the same interest as Colonel West except that his mother is still living, and I support Mr. Hunt's argument. Here the settlor and the appointor were the same person, and the codicil should not be construed so as to enable the settlor to destroy

(1) [1939] 1 Ch. 299.

a future interest which he had, or might have, already created.

MORTON J. [After stating the facts.] The difficulty which arises in the present case is as to the meaning of the words "or if married without leaving issue." If those words are taken at their prima facie meaning of "without leaving "issue her surviving," the result will be that neither of the sons of Mrs. West will take any part of her share although they both attained the age of twenty-one years and took a vested interest under the trusts set out in the settlement to take effect in default of appointment. Further, if that meaning is given to the words, it may be that Colonel West's life interest, which has been appointed to him by his wife, is destroyed. The West share of the property is now of the value of some 7,500*l.* I have referred to this codicil as being a curious document and I point out, in the first instance, that, although the testator is purporting to exercise his power of appointment he appoints in favour of the issue of any of his daughters who shall have died in his lifetime. Such issue were not objects of the power. Further, it would be a strange and capricious thing if the settlor, who was also the testator, should desire to cut out children of a daughter of his who had attained the age of twenty-one years, if they happened to predecease their mother, and to give over the share of their mother to her sisters and to the issue of any of her sisters who might have predeceased the testator, notwithstanding that those issue might have died under the age of twenty-one.

It is clear that the words "leaving issue" in their primary significance point to the period of death. It cannot be said that, in the ordinary meaning of the words, Mrs. West died leaving issue, since both of her sons predeceased her, but there is a well-known rule of construction which is sometimes referred to as the rule in *Maitland* v. *Chalie* (1) and is stated by Romer L.J. in *In re Cobbold* (2). In reading Romer J.'s judgment I propose to read it in the form which he undoubtedly intended it to bear. This was pointed out in *In re Davey* (3). So amended, the judgment of Romer L.J. is as follows: "If you "have a gift by will to A. for life, and after A.'s death to his "children in terms which would give them an absolute interest "in A.'s lifetime, and then you have a gift over simply in "these terms, 'if A. dies without leaving children,' you are

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(1) 6 Madd. 243.

(2) [1903] 2 Ch. 299, 304.

(3) [1915] 1 Ch. 847 *n.*

"to construe the expression 'leaving' so as not to destroy "any prior vested interest. In other words, you construe it "as meaning"—now I read the words as altered—"without "having had a child who had attained a vested interest. "That must now be treated as well settled."

In my judgment the rule thus laid down in *In re Cobbold* (1) does not necessarily apply to a case such as the present, where you do not find the two dispositions in a will. Here the disposition in favour of the children of A. occurs in a gift in default of appointment, under a settlement, and the subsequent provision in the event of A. dying "without "leaving children" occurs in a codicil exercising the power of appointment. There is no authority, so far as I am aware, which has extended the rule to such a case.

Mr. Pascoe Hayward has submitted that there is no reason why the rule should be extended to the present case. He points out that it is unlikely that a testator would wish to destroy a vested interest which he has previously given in the same testamentary disposition or series of testamentary dispositions. On the other hand, a power of appointment is directed to destroying interests which would have taken effect in default of appointment. In the present case the sons of Mrs. West, it is true, have attained a vested interest under the terms of the trust in default of appointment, but their interest was always liable to be destroyed by an appointment by the settlor. I think there is much force in that argument, and I am not satisfied that there is any good reason for applying the rule to such a case as the present one now before me, but assuming that the rule of construction stated by Romer L.J., does not apply to the present case, I am still of the opinion that I ought to construe the words "without leaving issue" as meaning "without having had a child who has attained "a vested interest." I think, reading this codicil as a whole, that the settlor intended merely to fill the gap which he realized might occur if a daughter died without having been married or, if married, without having a child who attained a vested interest. It is to be observed that, although he purports to be exercising his powers under the will, the settlor has not thought fit to interfere with the life interest conferred (in default of appointment) on his daughters, and I do not believe that he meant to cut out the children of a daughter who had attained the age of twenty-one by this curiously

(1) [1903] 2 Ch. 299, 304.

worded codicil. There are certain strange results which would follow if I gave the words their prima facie meaning. I need not elaborate them. Mr. Hunt called attention to some of them in his argument. It is enough to say that, reading the codicil as a whole and in all the circumstances of the present case, I am satisfied that the words " without leaving issue " mean and were intended to mean, " without having had a child " who has attained a vested interest."

The result is that the share in question ought to be held, subject to the life interest of Colonel West under the appointment to him, as to one moiety in trust for the personal representative of Charles Theodore West and as to the other moiety for the personal representative of Neville West. The second question should be answered by declaring that the defendant, R. H. Robinson, has a vested and indefeasible reversionary interest in the Robinson share.

Solicitors: *Routh, Stacey, Hancock & Willis; Montagu's & Cox & Cardale.*

H. L. L.

C. A.
1944
Feb. 4, 7; *Mar.* 2, 31.

In re HILL.

WESTMINSTER BANK LIMITED *v.* WILSON.

Administration—Annuities—Charge on capital and income—Estate insufficient to pay annuities out of income—Valuation—Payment out of income and of deficit out of capital.

When a testator has bequeathed annuities and charged them on capital as well as income, and, having regard to the anticipation of life of the annuitants, payment in full of the annuities can clearly be made out of income with resort to capital, the court will not order the annuities to be valued and their capital value paid.

Wright v. *Callendar* (1852) 2 De. G. M. & G. 652 applied.

In certain cases when there is a direction to pay annuities out of an estate which is insufficient by its income for the purpose, the annuities are actuarially valued and the values so ascertained treated as pecuniary legacies, but there is no rule of universal application to this effect, and it would be contrary to common sense to apply it where there is no proper ground for its application.

In re Cottrell [1910] 1 Ch. 402 explained.

APPEAL from Uthwatt J.

By his will, dated April 28, 1930, the testator, Arthur Lennox Hill, after appointing Westminster Bank Ld. to be

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executor and trustee of his will and bequeathing certain specific and pecuniary legacies and making other dispositions not material to be stated, devised and bequeathed all his real and personal estate not otherwise disposed of to the bank upon trust to sell and convert the same into money and after payment of his debts and funeral and testamentary expenses to invest the residue of the moneys and to hold the investments " (a) upon trust to pay the following annuities " to the following persons for their respective lives clear of all " deduction whatsoever (including income tax at the current " rate deductible at the source) by equal quarterly payments " . . . . viz. :—1. To the said Elizabeth Joan Elkington an " annuity of 500*l.* ; 2. To Eva Brown (spinster) . . . . an " annuity of 200*l.* ; 3. To Ethel Wilson (spinster) . . . . an " annuity of 100*l.*" The testator also provided that, if Eva Brown predeceased her brother, Reginald J. H. Brown, the annuity of 200*l.* payable to her during her life should be paid to him during his life, and that in the event (which happened) of Ethel Wilson predeceasing her brothers, Alfred Gurney Wilson and Noel Wilson, the annuity of 100*l.* payable to her during her life should be paid to them in equal shares for their joint lives and to the survivor for his life. Subject as stated, the bank was to hold the residuary estate and the income thereof in trust for the child or children of Reginald J. H. Brown who attained the age of twenty-one years or being female married under that age, and if more than one in equal shares. The testator died on April 28, 1942, Ethel Wilson and Noel Wilson having predeceased him so that the three existing annuitants were Elizabeth Jane Elkington, Evangeline D. K. Brown (called in the will Eva Brown), each of whom was sixty-two years of age, and Alfred Gurney Wilson who was sixty-four years of age. Reginald J. H. Brown was fifty-nine years of age. Basil Heath Brown was the residuary legatee. The income of the testator's residuary estate was insufficient to pay the annuities, and the bank took out a summons, to which the annuitants, Reginald J. H. Brown, and the residuary legatee were defendants, to ascertain (inter alia) whether, on the true construction of the will, the annuities ought to be valued, and if so, asking that all necessary directions should be given as to how the amounts were to be provided for. Uthwatt J. decided that the annuities ought to be valued according to the government tables and having regard to the gross amount and not the net amount (after deduction of tax) of each annuity. The residuary legatee appealed, claiming that the annuities ought not to be valued, but ought to be paid out of the income of the residuary estate, and, so far as that was insufficient, out of the capital. In the course of the hearing of the appeal evidence was adduced which showed that the expectation of life of the defendants, Elizabeth Jane Elkington and Evangeline D. K. Brown, was 15.55 years in each case; of the defendant, Alfred Gurney Wilson, 12.3 years; and of Reginald J. H. Brown, 14.92 years, and that, if the annuities were paid so far as possible out of income and so far as necessary out of capital, the residuary estate of the testator would last not less than forty-four years and would in certain circumstances last fifty-four years.

Jopling for the residuary legatee. There is no case for valuing the annuities and paying their capital value out of the testator's estate. That estate is solvent and there is no justification for adopting a course applicable to insolvent estates: *Wroughton* v. *Colquhoun* (1). In that case the estate was insufficient to enable the legacies to be paid and a fund to be set aside to answer the annuities in full. That principle was unduly extended in *In re Cottrell* (2), which did not establish a rule of general application, and although that case was approved by Sargant J. in *In re Dempster* (3), he had heard no argument for the residuary legatees. In *In re Cox* (4), the same principle was said to apply equally to annuitants inter se and to annuitants in competition with residuary legatees. It is unreasonable that the rule should be applied when the estate is sufficient to pay the legacies and to meet the annuities by resort to capital to the extent that the income is insufficient, if, as here, this course is in accordance with the testator's will and will result in the payment of the annuities in full without exhausting the capital. To apply the principle in such cases works great hardship on residuary legatees. [He also referred to *In re Grant* (5); *Wright* v. *Callendar* (6); *In re Richardson* (7).]

Christie K.C. and *Burnett Hall* for the annuitants. The real question is whether the court thinks that the rule as to

(1) (1847) 1 De. G. & Sm. 357.
(2) [1910] 1 Ch. 402.
(3) [1915] 1 Ch. 795.
(4) [1938] Ch. 556.
(5) (1883) 52 L. J. Ch. 552.
(6) (1852) 2 De. G. M. & G. 652.
(7) [1915] 1 Ch. 353.

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valuation of annuities ought to be followed when there is no possibility that the annuitants will be paid in full out of income. The justification of the rule is that it is convenient that executors should know how they stand, although in some cases the application of the rule may result in hardships as in a case where an annuitant dies soon after an order for valuation has been made, so that his estate gets the capital value of the annuity and the residuary legatee gets no part of it. [They referred to *In re Ellis* (1).] Uthwatt J. pointed out in *In re Bradberry* (2) that matters of administrttion are settled by practice and there is a well-settled practice applying to the present case. There is, it is true, no apparent reason why, when a testator directs payment of annuities out of income, and, if insufficient, out of capital, this should not be done where payment can thus be made in full. That seems to have been the position in *In re Cottrell* (3), and yet an order was made for a valuation: cf. *Wright* v. *Callendar* (4) where an order was not made. Uthwatt J. followed the settled practice and his decision ought not to be reversed.

Cur. adv. vult.

March 31. LORD GREENE M.R. read the judgment of the court (LORD GREENE M.R., MACKINNON and LUXMOORE L.JJ.) as prepared by LUXMOORE L.J. The main question raised in this appeal is whether the rule under which annuitants are given the actuarial value of their annuities when the annual income of an estate is insufficient to provide for them is one of universal application and must be applied even in a case where the annual income may only be a few pounds or even a few shillings short of the total sum required to provide for the annuities. Uthwatt J. held that the rule must be applied in the present case although recognizing that the result of the application would be to confer on the annuitants something not given by the terms of the will and more valuable to them than the testamentary dispositions.

The four surviving annuitants (5) are between the ages of fifty-nine and sixty-four. The testator's estate was valued for probate at 33,579*l.* gross, the net value after payment of duty being just over 26,000*l.* This sum is invested and produces a gross income of 995*l.* 18*s.* 6*d.* before deducting income tax, but the trustees contemplate certain changes of investment which will, it is estimated, reduce the gross income to 867*l.* or thereabouts. The annuities at present payable require for their discharge a gross annual sum of 1,114*l.* 10*s.* 6*d.* including the income fees payable to the trustee bank and the income tax on those annuities and fees. Having regard to the income of each of the annuitants, if income tax remains at the present standard rate a total sum of 46*l.* 3*s.* 6*d.* will be recoverable by the said annuitants and under the rule in *In re Pettit* (1) will be repayable annually to the testator's estate. The sum of 46*l.* 3*s.* 6*d.* so repayable annually represents a gross annual sum of 92*l.* 7*s.* 0*d.* and on the figures stated the gross annual income of the testator's estate available to meet the gross sum of 1,114*l.* 10*s.* 0*d.* is 959*l.* 7*s.* 0*d.* There is thus an annual deficiency of 155*l.* 3*s.* 0*d.* The evidence now before the court establishes that, if the annuities and all consequential payments having regard to the terms of the will are paid so far as possible out of income and so far as necessary out of capital, and bearing in mind that capital will have to bear income tax on any net sum paid thereout, the estate will last fifty-four years if the amounts receivable under the rule in *In re Pettit* (1) are taken into account and forty-four years if these amounts are ignored. It must be borne in mind that these calculations are based on all of the annuitants being alive during the whole of the said periods of fifty-four or forty-four years as the case may be, so that the alternative ages of the annuitants would at the end of the first period vary from one hundred and thirteen to one hundred and eighteen and in the second alternative period from one hundred and three to one hundred and eight years. The evidence further establishes that the total actuarial value of the several annuities now payable under the testator's testamentary dispositions is 15,054*l.* 3*s.* 4*d.*

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(1) [1935] Ch. 193.
(2) [1943] Ch. 35.
(3) [1910] 1 Ch. 402.
(4) 2 De G. M. & G. 652.
(5) The reference to "four surviving annuitants" includes Reginald J. H. Brown, who is to succeed Evangeline D. K. Brown if she predeceases him.

It appears, therefore, to be plain on the evidence that since the annuities are charged on capital as well as income there is no commercial risk that the annuities will not be paid in full if they are paid out of income and capital as and when they fall due for payment. Indeed, if and when any one of the annuities, even though it be the smallest, ceases to be payable, the income of the estate will then be sufficient to meet those

(1) [1922] 2 Ch. 765.

annuities which remain to be paid. It is well settled that in certain cases where there is a direction to pay annuities out of an estate which is insufficient by its income to provide for them such annuities may be valued according to actuarial principles and the values so ascertained treated as pecuniary legacies and paid over to the annuitants. The question is whether this method must be applied or can be insisted on in every possible case.

In the ordinary case where there is a simple gift of an annuity with a direction to set aside a fund to answer it, the annuity being charged on capital as well as income and there being a gift over of the residue of the estate, it was decided in *Wright* v. *Callendar* (1) that the right of the annuitant and the other persons interested is to have the directions of the testator carried into effect, and, if the estate is not sufficient to pay the annuitant in full, he is entitled to have the deficiency made up out of capital, but he must take the estate as it stands and is not, except with the consent of the persons entitled to the residuary estate, to have the value of the annuity paid over to him. This is, undoubtedly, the law where the question is simply as between an annuitant and the residuary legatees. Where, however, pecuniary legatees are also concerned and the estate is insufficient for the payment of the annuity and the pecuniary legacies, then where there is a direction in the will to set apart and invest a sum sufficient to answer the annuity the court, as a matter of convenience of administration, directs the annuity to be valued and treats the amount of the valuation as a legacy and makes it abate in its due proportion and pays the abated amount to the annuitant: see *Wright* v. *Callendar* (1); *Wroughton* v. *Colquhoun* (2). There is an intermediate case where, although the estate is insufficient to pay pecuniary legacies in full and to set aside a fund sufficient by its income to answer the annuity or annuities, the estate is sufficient to pay the pecuniary legacies and the full value of the annuity or annuities and even to leave a surplus for residue, and in such a case it is usual to apply the rule, but it would seem that there is no reason to do so if there is no competition between the legatees and annuitants or between the annuitants inter se, for example, in a case like the present where the pecuniary legatees can be paid in full at once and it is plain on the evidence that the residue will be more than sufficient to pay all the annuities

(1) 2 De G. M. & G. 652.

(2) 1 De G. & Sm. 357.

in full as and when they fall due in accordance with the testator's directions. It was argued that the decision in *In re Cottrell* (1) laid it down that the rule was of universal application and ought to be applied even in cases where it is certain that a testator's directions with regard to the payment in full of legacies and annuities will be fulfilled to the last penny although the direction for setting apart a fund sufficient by its income to provide the annuities cannot be satisfied. We are unable to agree that the decision goes to any such length. The facts in *In re Cottrell* (1) would appear to leave little doubt but that the residue of the estate after payment of the legacies was in all circumstances sufficient by its income and capital to ensure that the annuity would be paid in full and the residue would not be exhausted unless the annuitant lived for a period far beyond the expectancy of human life, but no reference was made to this either in argument or by the learned judge. In that case, as in the general run of cases, the direction to appropriate a sum to provide by its income for an annuity is properly speaking a provision for convenience of administration and is in reality ancillary to the gift of the annuity if it be charged on capital, and it is plain from the decision in *Wright* v. *Callendar* (2) that, if there be no competing legacy such a direction would be ignored. It seems to follow that if an estate after payment in full of the legacies bequeathed can be said to be sufficient to answer out of income supplemented by capital an annuity (if only one be given) or a number of annuities (if more than one be given), the direction to set aside should also be ignored.

The reason for the application of the rule *In re Cottrell* (1) is we think, correctly stated by Simonds J. in *In re Cox* (3). "The reason [for the application of the rule] is clear from a "hypothetical example. Suppose an annuity of 100*l.* is "bequeathed to one annuitant, A., who is ninety years of age, "and a similar annuity to another, B., who is nineteen years of "age, and suppose that the whole estate available for satisfaction of the annuities is only 1,000*l.* If both the income "and the capital of that sum are applied year by year until it "is exhausted in payment of the two annuities, A. will probably "get his annuity paid in full for the whole of his life, but B. "will not do so. There is thus an inequality in this treatment "which the testator is presumed not to have intended. The

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(1) [1910] 1 Ch. 402.

(2) 2 De G. M. & G. 652.

(3) [1938] Ch. 556, 563.

" only fair way of dealing with annuities as between annuitants " of different ages is to make an actuarial valuation of the " annuities, and to pay the value of each so ascertained to the " annuitants." The reason so stated has obviously no application to a case like the present where it is plain that the available estate is more than sufficient to provide for the payment in full of the annuities out of income and capital as directed by the testator unless a series of events should transpire entirely outside the scope of human expectation, namely, the joint survival of all the annuitants for a period of time of impossible length having regard to their ages at the time when the matter is to be considered. Uthwatt J., though he obviously felt the hardship on the residuary legatees that would be caused by so doing, applied the rule because he thought it was one of universal application and that to refuse to do so would create confusion in the administration of other estates. The rule, however, is not a rule of law. It is one of convenience. As Uthwatt J. himself said in *In re Bradberry* (1) " Matters of administration are settled by practice which " reflects common sense or, what is to my mind the same thing, " reason tempered by convenience." It would be contrary to common sense to apply the so-called rule to a case where there is no proper ground for its application, and when, by so doing, the testator's directions are interfered with unnecessarily and an inequitable result is achieved. No confusion can be caused if the court refuses to apply the rule where it is clear on the evidence that all the annuities can properly be satisfied in full out of the estate and there is no commercial risk of any insufficiency. In the court below the case was argued on the footing that such a state of facts existed, but there was no direct evidence to support it. When the case was argued in this court the attention of the parties was called to the absence of such evidence and an opportunity was given to file the necessary affidavit. This has now been done and it is conclusively established by it that the annuities given by the will must, in any event, be satisfied in full and be paid as and when they fall due.

For the reasons stated we think the learned judge was in error in holding that the rule in question was one of universal application and in applying it to the present case. The appeal must be allowed and a declaration made as asked by the notice of appeal—that, on the true construction of the will and in the events that have happened, the annuities in question ought not to be valued, but that the same ought to be paid out of the income of the testator's residuary estate, and, so far as income may be insufficient, out of capital.

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(1) [1943] Ch. 35, 40.

Appeal allowed.

Solicitors: *Philcox, Sons & Edwards; Peacock & Goddard, for Trevanion, Curtis & Ridley, Bournemouth.*

H. C. G.

MORTON J.
1944
March 28.

In re R. W. SUMNER, A SOLICITOR.

In re TAXATION OF COSTS.

Solicitor—Costs—Taxation—Non-contentious business—Application to transfer taxation to district registry—No proceeding in registry—Jurisdiction—R. S. C., Or. 35, *rr.* 6A, 17.

An order for taxation of a bill of costs incurred in non-contentious business having been obtained on petition, the solicitor applied by summons for an order transferring all proceedings in the taxation to the Manchester or the Liverpool district registry on the ground that he practised at Southport, was unable owing to pressure of business to attend a taxation in London, that his clients also resided in the north and that a transfer would, therefore, be for the convenience of all parties:—

Held, (1) that there being no cause or matter proceeding in either registry and no summons issued therein, the court had no jurisdiction to transfer the taxation under R. S. C., Or. 35, r. 6A; (2) that assuming that the case came within Or. 35, r. 17, so that the court could order the transfer of the taxation, and that good reason had been shown for transfer, the order for transfer could not confer on the district registrar power to act as taxing master for the taxation of the bill.

PROCEDURE summons.

On November 29, 1943, the applicant, R. W. Sumner, solicitor practising at Southport, delivered to his clients, the respondents, Mrs. J. L. Wright and Miss S. Wright, a bill of costs covering some four years' work in the administration of an estate in which they were interested. On February 3, 1944, they obtained on petition an order for taxation of the bill. By the present summons the applicant asked for an order to transfer all proceedings directed by the order for taxation to the district registry either at Manchester or Liverpool on the ground that he was working almost single-handed at his practice at Southport, and could not leave it to come to London and spend several days before the taxing master. The whole of the work, according to the applicant's affidavit, had been done in the north of England, one party resided at Liverpool and the other at Halifax, and it would be most convenient for all persons concerned that the district registrar should act as taxation officer.

J. F. Bowyer for the applicant. The whole of the work charged for in this bill of costs was done by the applicant at his Southport office, and both the respondents live in the north of England, so that it will be most convenient for all parties to transfer this taxation to the Manchester district registry under R. S. C., Or. 35, r. 6A (1), the district registrar can tax bills of costs in non-contentious business. The position would be the same as if a summons had been taken out in the district registry. If there is no jurisdiction to remove the taxation to Manchester under r. 6A, it can be done under r. 17 (1).

Fawell for the respondents. There is no jurisdiction under the rules to transfer this taxation. There is no " cause or " matter proceeding " in the district registry within r. 6A and no summons issued therein. The district registrar can only act as taxing master in a matter pending in the district before the issue of proceedings which start the taxation. The transfer of a non-contentious cause or matter will not thereby constitute him a taxing authority.

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(1) By R. S. C., Or. 35, r. 6A: " Where a cause or matter hereafter commenced in the Chancery Division is proceeding in " the district registry of Liverpool " or in the district registry of " Manchester, or where a summons is issued in either of those " district registries for the taxation " of the costs of a solicitor under " any statute or otherwise, the " district registrar shall act in " respect thereof, and throughout " all the proceedings therein . . . . " as a chief clerk (1) of the judge of " the Chancery Division to whom " the cause or matter is assigned " . . . . and as registrar and " taxing-master of the Supreme " Court according to directions to " be given from time to time by " such judge: provided also that " . . . . no district registrar who " is a practising solicitor shall tax " the costs in any such cause or " matter."

By r. 17: " Any party to a " cause or matter proceeding in " London may apply to the court " or a judge for an order to remove " the cause or matter from London to any district registry, and " the court or judge may make an " order accordingly, if satisfied, " that there is sufficient reason for " doing so, upon such terms, if " any, as shall be just."

(1) [These words appear in the rule as printed in the Annual Practice, "Master" is the word used in the official copy of the St. R. & O. and in the Yearly Practice.—Ed.]

MORTON J. In support of his application the applicant has filed an affidavit setting forth certain reasons why it would be more convenient for all parties if the taxation is transferred to the Manchester district registry. The respondents to the summons do not share that view. The applicant's affidavit shows some reason for the transfer if I have jurisdiction to make the order, but on the weight of that reason I express no opinion. It is submitted by counsel for the respondents that I have no jurisdiction to make the order, and I have come to the conclusion that that submission is correct.

In *In re R. W. Stead, A Solicitor* (1), an application had been made by an originating summons in the Manchester district registry for an order referring the bill of costs of a solicitor for non-contentious business to the district registrar for taxation, and the Court of Appeal held that " although an originating " summons was the proper form in which to make the applica- " tion and a judge of the King's Bench Division had power to " refer the bill for taxation yet the district registrar was not " the 'proper officer' to whom a bill for non-contentious " business could be referred for taxation within s. 37 of the " Solicitors Act, 1843, and that the bill must be taxed by " a master of the Supreme Court." Section 37 of the Solicitors Act, 1843, has now been replaced by s. 66 of the Solicitors Act, 1932. That case was affirmed by the House of Lords (2). I think it is plain from the decision in *In re Stead* (1) and the reasons given by the members of the Court of Appeal for that decision that this application cannot succeed unless by some means it can be brought within certain words which were inserted in R. S. C., Or. 35, r. 6A, in September, 1910—I think very probably as a result of *In re Stead* (1). Under that rule there is provision that in certain circumstances which are defined in the rule the district registrar may act as a taxing master of the Supreme Court. It is plain that the applicant cannot bring himself within the rule. Clearly the present case does not come within the words, " Where a cause or " matter hereafter commenced in the Chancery Division is " proceeding in the district registry of Liverpool or in the

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(1) [1910] 2 K. B. 713.

(2) [1911] A. C. 688.

"district registry of Manchester," nor is this a case where a summons has been issued in either of those district registries for the taxation of the applicant's costs. Mr. Bowyer, for the applicant, submits, however, that I can make an order for the transfer of this matter to the district registry of Manchester under Or. 35, r. 17, and thereupon the district registrar of Manchester will be in a position to tax the costs in question. I do not take that view. It seems to me that, even if I assume, first, that the present case comes within r. 17 so that I could transfer it, and, secondly, that there is good reason shown for transferring it, there is still no ground on which the district registrar of Manchester is empowered to act as a taxing master for the taxation of this bill. I am not expressing any view whether the present case does or does not come within the provisions of r. 17, but, even if it does, it seems to me that there could be no good object to be achieved by making an order for transfer because the order for transfer could not confer on the district registrar in Manchester the jurisdiction which it is desired he should exercise. It seems to me that unless the case comes within the wording of Or. 35, r. 6A (which it does not), the district registrar cannot tax this bill. For these reasons, I dismiss this summons, with costs.

Solicitors: *Field, Roscoe & Co., for Arkle & Darbishire, Liverpool; Williamson, Hill & Co., for H. Collinson, Halifax.*

H. L. L.

J. LYONS & COMPANY, LIMITED *v.* ATTORNEY-GENERAL.

UTHWATT J.
1944
Mar. 2, 29.

Emergency legislation—War damage—"Plant and machinery"—Restaurant—Electric lamps and fittings—War Damage Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *s.* 103, *sub-s.* 5—*Plant and Machinery* (*Valuation for Rating*) *Order,* 1927 (*St. R. & O.,* 1927, *No.* 480), *sch. to cl.* 1 (*b*), *para.* (*e*) (*ii.*).

A tea-shop having been damaged by enemy action in 1941, the company owning it claimed a cost-of-works payment under s. 6, sub-s. 1 (*a*.), of the War Damage Act, 1943, which included the cost of replacing electric lamps used for lighting the premises, and fittings annexed thereto, as being "plant" or "machinery" on the hereditament within s. 103, sub-s. 5, of the Act and the

UTHWATT J.

1944

J. LYONS & CO., LD. v. ATTORNEY-GENERAL.

schedule to cl. 1 (*b*), para (*e*) (ii.) of the Plant and Machinery (Valuation for Rating) Order, 1927 :—

Held, that the electric lamps and fittings were not part of the apparatus used for carrying on the business, but were part of the setting in which the business was carried on, and, therefore, were not " plant," the subject of compensation within the Act.

ADJOURNED summons.

The plaintiffs, J. Lyons & Co., Ld., occupied a tea-shop at 9 Cranbrook Road, Ilford, which was damaged by enemy action in March, 1941. The premises were fitted with twenty-nine electric lamps, of which twenty were used for general illumination, and six were described as " counter-lamps." Current was supplied by the Ilford borough council. The plaintiffs made a claim to the War Damage Commission for a cost of works payment of 762*l*., of which 3*l*. 5*s*. 2*d*. represented the cost of twenty electric lamps destroyed and replaced excluding counter and window lamps. The commission refused the claim as to these twenty lamps and their proper fittings, and this summons was taken out to determine the question whether the lamps and fittings in question were " plant and machinery " within s. 103 of the War Damage Act, 1943 (1), and a proper subject for compensation under part I. of the Act. It was agreed at the hearing that the six counter lamps should be excluded from consideration

(1) By War Damage Act, 1943, s. 103 : " (1) In this Act, unless " the context otherwise requires, " the expression 'land' has the " meaning assigned to it by the " following provisions of this sec- " tion . . . . (5) The said ex- " pression includes . . . . such " plant and machinery as would, " if the land were a hereditament " to which s. 24 of the Rating and " Valuation Act, 1925, applied, be " by virtue of the provisions of " that section and of the Plant & " Machinery (Valuation for " Rating) Order, 1927, deemed, for " the purposes mentioned in " sub-s. 1 of the said s. 24, to be " a part of the land, or where the " land is a hereditament to which " the said s. 24 applies, such plant " and machinery as is so deemed " for those purposes to be a part " of the land."

By the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927 : " Classes of " machinery and plant deemed to " be part of the hereditament " . . . . Class 1 (*b*) : Machinery " and plant specified in paras. (*a*) " to (*h*) of the schedule to this " class . . . . which is used or " intended to be used mainly or " exclusively in connexion with " the heating, cooling, ventilating, " lighting, draining or supplying of " water to the land or buildings of " which the hereditament consists " . . . . Schedule to class 1 (*b*) " . . . . (*e*) Lighting. (i.) Gas " pressure regulators ; gas burners. " (ii.) Plug-sockets and other out- " lets ; electric lamps."

Wynn Parry K.C. and *Sophian* for the plaintiffs. The electric lamps and fittings used on the plaintiffs' premises come within the definition of "machinery and plant" contained in the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927, and must, therefore, be deemed to be part of the "land" for damage to which compensation is provided by the War Damage Act, 1943: see *Townley Mill Co. (1919), Ld.* v. *Oldham Assessment Committee* (1). Section 103, sub-s. 5, applies, not only to plant in factories, but also to plant in all buildings, including private houses. The test whether any particular plant falls within the order of 1927 and the sub-section depends on whether it is used for the lighting of the building. Here the lamps are required for the purposes of the business carried on on the premises, and, therefore, they are "plant." The holders, plugs and other accessories are equally "plant." [*Yarmouth* v. *France* (2) was also referred to.]

Sir Donald Somervell A.-G. and *Danckwerts* for the defendant. The word "plant" does not include these electric light bulbs. The conception of "machinery and plant" was not intended to be enlarged by the Rating and Valuation Act, 1925. On the contrary, the effect of the Act and of the order of 1927 was rather to limit the scope of the words. Some limitation must be placed on the meaning of the words. The wide definition of "plant" claimed in this case would include loose tools which are certainly not rateable. The lamps were required to light the premises and had nothing to do with the trade carried on thereon. *London & Eastern Counties Loan and Discount Co.* v. *Creasey* (3) shows that "plant" for the purpose of one Act of Parliament is not necessarily "plant" within another.

Cur. adv. vult.

Mar. 29. UTHWATT J. read a judgment in which he stated the facts and continued: "Land" is, for the purpose of the War Damage Act, 1943, defined in s. 103. The effect of the definition is that "land" includes any building or works situate over or under the land other than plant and machinery not expressly included by the terms of the section as part of the land. The plant and machinery so included, in the case of the premises

(1) [1937] A. C. 419.
(2) (1887) 19 Q. B. D. 647.
(3) [1897] 1 Q. B. 442.

under consideration, is the plant and machinery which, on the footing that the land was a hereditament to which s. 24 of the Rating and Valuation Act, 1925, applied would, under the provisions of that section, and the Plant and Machinery (Valuation for Rating) Order, 1927, be deemed, for the purposes of the making or revision of valuation lists under part I. of the Act of 1925, to be part of the land. The contention of the company is limited to the proposition that the lamps and the fitments are " plant " which would be so deemed to be part of the land, and it was not contended that, if they were not plant, they formed part of the building or works. In the result, therefore, the only questions at issue are the construction and the application to the facts of the case of s. 24 of the Act of 1925 and of the order of 1927 as they would be construed and applied for rating purposes.

The leading provision in s. 24 is that " all such plant or " machinery in or on the hereditaments as belongs to any of " the classes specified in the third schedule shall be deemed to " be a part of the hereditament." To enable all persons concerned to have precise information as to what plant or machinery fell within the classes specified in the third schedule the minister was empowered by order to confirm, with or without modification, a statement setting out in detail all the machinery and plant appearing to a committee set up by him to fall within those classes, and the statement so confirmed was to have effect as if it were substituted for the third schedule: see sub-ss. 3, 4 and 5. The order of 1927 was made pursuant to this power. The classes (following the classes set out in the third schedule to the Act) are set out in the schedule to the order under the heading " Classes of machinery and " plant deemed to be part of the hereditament Class 1 (*b*) (omitting the proviso, which is irrelevant as none of the lamps in question are used for manufacturing operations or trade processes) is the relevant clause. It runs as follows: " Machinery and plant specified in paras. (*a*) to (*h*) of the " schedule to this class (together with the appliances and " structures accessory thereto specified in para. 2 of the " schedule of accessories) which is used or intended to be " used mainly or exclusively in connexion with heating, " cooling, ventilating, lighting, draining, or supplying of " water to the land or buildings of which the hereditament " consists, or the protecting of the hereditament from fire." Paragraph (*c*) of the schedule to class 1 (*b*) is headed

"Lighting." It includes "gas pressure regulators gas "burners; plug-sockets and other outlets; electric lamps." Paragraph (2.) of the schedule of accessories covers under its general words the fitments of the character here in question.

Two questions are raised. The first question is whether, as a matter of construction, it is sufficient, as contended by the company, that electric lamps are in terms specified in the schedule to the order, or, as is contended by the Attorney-General, it is only electric lamps which are machinery or plant, or a component part of machinery or plant, that under the section form part of the hereditament. The second question is whether, assuming the company fail in their first contention, these particular lamps are plant within the meaning of the section. Both questions lie within a small compass. In considering them it is to be borne in mind that s. 24 of the Act applies to all hereditaments (except those valued on a profits or similar basis). The section is not confined to factories, for machinery or plant may well be found in private houses or business premises: see *Townley Mill Co., Ld.* v. *Oldham Assessment Committee* (1). Secondly, it is not necessary under the section that the machinery or plant should be a fixture or in any way annexed to the hereditament. The section is expressed to apply to plant or machinery "on" as well as "in" the hereditament.

On the first question, I am of opinion that the contention of the company is not correct. The general structure of the section is that such machinery or plant in or on the land as falls within the terms of the third schedule or any substituted statement is to be deemed part of the hereditament, not that such articles as fall within those terms are machinery or plant. Head (*a*) of sub-s. 1 of s. 24 is clear in its terms. It is plant or machinery which belongs to the classes specified in the third schedule—now replaced by the substituted statement—that are to be taken into account. There must be plant or machinery to begin with; and, next, it must fall within one or other of the specified classes. The language used in sub-ss. 2, 3 and 7, bears out this interpretation of sub-s. 1. When it comes to specifying classes, the words used may or may not be, when taken by themselves, appropriate only to machinery or plant. In so far as they are appropriate to articles, whether or not machinery or plant, the effect of the section is to confine their application to machinery or plant.

(1) [1937] A. C. 419, 432, 441.

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As regards the substituted statement, I have already quoted the relevant part. Class 1 (*b*) is not composed of the articles specified in paras. (*a*) to (*h*) used or intended to be used for certain specified purposes, but it is composed of " machinery " and plant " specified in the paragraphs so used or intended to be used. I see nothing in the terms of the substituted statement to warrant the inference that all articles falling within categories (*a*) to (*h*) are, given the condition as to use or intended use, in all circumstances to be regarded as machinery and plant. In most cases there can be no question that articles falling within the descriptions appearing in the schedule to class 1 (*b*) are, in fact, plant or machinery, but there are other cases, of which the electric lamps and pumps may be taken as examples, where the description given may apply to an article which only in certain circumstances can properly be described as plant. In those cases the necessity arises for determining as a matter of fact whether the particular articles merit the appellation " plant."

The question then arises whether the lamps and fitments in question in this particular building are " plant." They obviously are not machinery. The word " plant " is not defined in the Act. I do not think that the use throughout s. 24 of the Act of the word " plant " as part of the phrases " plant or machinery " and " machinery and plant " has the effect of confining the meaning of the word to such plant as is used for mechanical operations or processes. Next I find it unnecessary, for the purposes of a decision in this case, to enter on the question whether any particular limitation should be placed on the general sense borne by the word " plant " by reason that the Act in which it appears is a rating Act. I propose to assume that no such limitation should be placed. Nor do I think it necessary to attempt a general definition of the word " plant." No definition of " plant " would include the lamps and fitments here under consideration, if they were found in a private house supplied with electricity by public suppliers. If these articles are plant, it can only be by reason that they are found on premises exclusively devoted to trade purposes. Trade plant alone need be considered. Confining my attention to trade plant, I am content to accept the general description in *Yarmouth* v. *France* (1) that " plant " includes whatever apparatus or instruments are used by a business man in carrying on his business. The term does not

(1) (1887) 19 Q. B. D. 647.

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include stock-in-trade, nor does it include the place in which the business is carried on. Whether any particular article more properly falls within "plant" as thus understood or in some other category depends on all the circumstances of the case.

In the present case, the question at issue may, I think, be put thus: Are the lamps and fitments properly to be regarded as part of the setting in which the business is carried on or as part of the apparatus used for carrying on the business? The lamps and their fitments are owned by a caterer and used in premises exclusively devoted to catering purposes, but the presence of lamps in this building is not dictated by the nature of the particular trade there carried on or by the fact that it is for trade purposes that the building is usd. Lamps are required to enable the building to be used where natural light is insufficient. The actual lamps themselves, so far as the evidence goes, present no special feature either in construction, purpose or position, and, being supplied with electricity from public suppliers, they form no part of an electric lighting plant in or on the hereditament. In my opinion, these lamps are not, in these circumstances, properly described as "plant," but are part of the general setting in which the business is carried on. They would not, I think, in any catalogue of this trader's assets, fall under the heading "machinery and plant," and I hold that the lamps and the fitments in question are not machinery or plant for the purposes of the War Damage Act, 1943.

Solicitors: *Bartlett & Gluckstein; Treasury Solicitor.*

H. L. L.

In re SEBRIGHT; PUBLIC TRUSTEE *v.* SEBRIGHT.

VAISEY J.

1944

Mar. 15, 16, 17, 30.

Settlement—Jointure rent-charge—Income tax—Deduction—Rate of tax—Jointure paid in arrear—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 19—*Finance Act,* 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 39, *sub-s.* 1—*Payment of jointure to be "without any deduction"—Exoneration from succession and estate duties.*

Distinguished. In re KEELE ESTATES (No. 2) [1952] 1 Ch. 603

By a will made in 1897, estates were settled in the usual form of a strict settlement and power was given to a tenant for life in possession by deed or will to appoint to any wife he might marry during the residue of her life, if surviving him, a jointure not

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exceeding 600*l.* a year charged on the estates. In 1906, the then tenant for life, in exercise of the power, by deed appointed a jointure of 600*l.* during the residue of the life of his wife, if she should survive him, to be paid to her half-yearly "without any deduction." In 1922, a later tenant for life exercised the power in favour of his wife on similar terms but this jointure was still in suspense owing to the first having taken effect. In 1929, the present tenant for life covenanted with the second jointress to pay her an annuity of 600*l.* until she became entitled to receive her jointure, and charged the annuity on his life estate. The payment of the first jointure and the annuity fell into arrear for several years, but there came into existence a fund, on which income tax at the rate of 10*s.* in the pound had been paid, which was available for discharging the arrears. Under r. 19 of the All Schedules Rules in the Income Tax Act, 1918, as amended by the Finance Act, 1927, s. 39, sub-s. 1, income tax must be deducted by the payer of any annual sum "at the standard rate for the year in which the amount payable becomes due":—

Held, (1.) that tax ought to be deducted from the arrears, when paid, at the standard rate for the year in which the jointure and annuity fell into arrear and ought to have been paid, and not at the rate existing at the date of payment; and (2.) that, by the appointment for payment "without any deduction," the jointures were freed from any liability to pay succession and estate duties.

In re Smith-Bosanquet [1940] Ch. 954 followed on the latter point.

ADJOURNED summons.

Under a settlement contained in the will of Sir Egbert Cecil Saunders Sebright, who died on April 1, 1897, the defendant, Sir Giles Edward Saunders Sebright, was tenant for life in possession, and his son, the infant defendant, Hugo Giles Edmund Sebright, tenant in tail male in remainder of the Sebright estates. The will contained the following power of appointment: "It shall be lawful for each male person hereby "made legal or equitable tenant for life of the said premises "hereby demised either before or after he shall become entitled "to the possession or receipt of the rents and profits of the "same premises but subject and without prejudice to the "limitations powers and charges having priority to the estate "of the appointor at any time either before or after his marriage "by any deed or deeds revocable or irrevocable or by will or "codicil to appoint to any wife he may marry during the residue "of the life of such wife if surviving the appointor or for any "less period any yearly rent-charge or rent-charges by way of "jointure not exceeding in the whole for the wife of any one "appointor the yearly sum of 600*l.* to be charged upon all or "any of the hereditaments hereby devised and to be payable "at such times and in such manner as the appointor shall "direct with such powers and remedies for securing the same "by distress and entry and receipt of the rents and profits of "the same premises and by appointing or demising the premises "so charged to any person or persons for any term of years "upon trusts for securing the same rent-charge or rent-charges "as the appointor shall think fit." After providing that the power might be exercised as often as the person exercising it should marry and that any rent-charge appointed under the power was not to be payable unless and until either the appointor should be, or become, entitled to the possession or to the receipt of the rents and profits of the premises, or some issue of the appointor should, or, if in existence and of full age, would, be so entitled, the will proceeded: "Provided also "that the said devised premises or any of them shall not under "the power lastly hereinbefore contained be at any one time "subject to the payment of yearly rent-charges which in the "whole shall be in excess of the annual sum of 600*l.* but any "rent-charge or rent-charges or any part of any rent charge "which but for this proviso would have occasioned or formed "such excess shall from time to time during the continuance "of such excess not be raisable out of the premises and the "several rent charges appointed are to have the like priority "as the estates of the persons by whom they are appointed." In exercise of the power contained in the will, by deed poll, dated July 13, 1906, Sir Guy Thomas Sebright, created a jointure of 600*l.* a year issuing out of the hereditaments subject to the will in favour of the defendant, Olive Emily Lady Sebright. By deed poll, dated September 28, 1922, Arthur Edward Saunders Sebright appointed a similar jointure of 600*l.* in favour of Mrs. Alice Marion Sebright to remain in suspense until the first jointure terminated. By a deed of covenant, dated May 15, 1929, Sir Giles Sebright covenanted to pay an annuity of 600*l.* to Mrs. Sebright charged on his life estate during the period of the suspense of her jointure. Sir Giles Sebright's life estate was further charged with certain annual payments to mortgagees in favour of whom the jointresses had postponed the payment of their jointures. Both jointures ranked in priority to Sir Giles's life interest, and both were expressed to be payable "without any deduction." The annuity was not expressed to be so payable. The payments of the first jointure and of the annuity for several years fell into considerable arrears, but there was now in hand a sum representing rents or

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other income of the estates available to discharge those arrears. Income tax at the current rate of 10*s.* in the pound had been paid or accounted for to the revenue on these sums, and the first question raised by this summons, taken out by the trustees of the will, was at what rate income tax ought to be deducted from the payments to be made in discharge of the arrears—whether at the rate current when the jointure should have been, but was not, paid, or at the rate current when income became available to pay the arrears. The second question was whether the jointures being appointed, to be paid "without any "deduction," were exonerated from succession and estate duty, or whether in that respect the appointments exceeded the power.

G. D. Johnston for the Public Trustee.

Wynn Parry K.C. and *Donald Cohen* for Olivia Lady Sebright. On the payment of any arrears of the jointure payable to Lady Sebright, income tax should be deducted at the standard rate in force at the several dates when the payments became due and payable according to the tenor of the document charging them. For instance, the jointure fell into arrear in 1936 when income tax was at the rate of 4*s.* 6*d.* in the pound, and, in paying the arrears then incurred, tax at that rate only must be deducted. Under r. 19 of the All Schedules Rules in the Income Tax Act, 1918 (1), as amended by s. 39 of the

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(1) By r. 19 of the All Schedules Rules made under the Income Tax Act, 1918: "(1.) Where any "yearly interest of money, an-"nuity, or other annual payment "(whether payable within or out "of the United Kingdom) . . . . "is payable wholly out of profits "or gains brought into charge to "tax, no assessment shall be "made upon the person entitled "to such interest, annuity, or "annual payment, but the whole "of those profits or gains shall "be assessed and charged with "tax on the person liable to "the interest, annuity, or annual "payment, without distinguish-"ing the same, and the person "liable to make such payment ". . . . shall be entitled, on "making such payment, to deduct "and retain thereout a sum "representing the amount of the "tax thereon at the rate or rates "in force during the period "through which the last said pay-"ment was accruing due."

By Finance Act, 1927, s. 39, sub-s. 1, it was, in effect, provided that for the words "the rate or "rates of tax in force during the "period for which the payment "was accruing due" in r. 19 (and other provisions) there should be substituted the words "at "the standard rate for the year "in which the amount payable "becomes due."

Finance Act, 1927, the deduction of tax in such a case as this is to be made "at the standard rate for the year in which the "amount payable becomes due." There is sufficient money to pay all arrears, but it must be first used in paying the annuity for the current year. [They referred to *In re Lord Westbury's Settlement* (1); *Lambe* v. *Inland Revenue Commissioners*(2).]

Wilfrid Hunt for Mrs. Alice Marion Sebright.

Sir Norman Touche for Sir Giles Edward Sebright. The tax should be deducted at the rate in force when sufficient income becomes available to pay the arrears. Lady Sebright's jointure is only payable out of the surplus income of the estates. Until there is a surplus nothing is payable, there was no surplus, after payment of the interest on the mortgages to which the property was subject, until after the rate of income tax had risen to 10*s*. in the pound. An annuity may be due when tax is at the rate of 5*s*. in the pound, and only become payable and be paid when it is at the rate of 10*s*. in the pound. Income tax is levied on actual not hypothetical income, and until there is income, there is no tax: see *Luipard's Vlei Gold Mining Co., Ld.* v. *Inland Revenue Commissioners* (3). Rule 19 applies only when an annuity is payable wholly out of profits brought into charge. It contemplates the right of the payer to deduct and the payee to be liable to, exactly the same tax. It presupposes that these are profits brought into charge. [*Dewar* v. *Inland Revenue Commissioners* (4); *Leigh* v. *Inland Revenue Commissioners* (5) were referred to.]

On the second point of the summons,

Wynn Parry K.C. and *Donald Cohen*. The jointure rent-charge payable to Olivia Lady Sebright is free from any deduction for estate or succession duty payable on the death of Sir Guy Sebright: *In re Smith-Bosanquet* (6), which is indistinguishable on the facts.

Sir Norman Touche. In *In re Smith-Bosanquet* (6) the annuity was payable out of the income of a residuary trust fund the amount of which was only arrived at after payment of estate

(1) Ante p. 4.
(2) [1934] 1 K. B. 178.
(3) [1930] 1 K. B. 593.
(4) [1935] 2 K. B. 351.
(5) [1928] 1 K. B. 73.
(6) [1940] Ch. 954.

duty. That does not apply here. The judgment in that case does not make it clear on what ground it was decided, but if it is indistinguishable from the present case, it was not correctly decided. The will in the present case does not authorize an appointment of a jointure free of estate duty, and the appointment is in excess of the power; *Hervey* v. *Hervey* (1); *Lady Londonderry* v. *Wayne* (2); and see Sugden on Powers, 8th ed., p. 704; Farwell on Powers, 3rd ed., p. 588; Davidson's Precedents in Conveyancing, 3rd ed., vol. III., pt. 1, pp. 472, et seq.; *In re Turnbull* (3).

A. C. Nesbitt for the infant defendant.

Belsham for mortgagees.

Wynn Parry K.C. in reply. The creator of the power did not intend that the jointure in each case should be less than 600*l.* a year.

Cur. adv. vult.

Mar. 30. VAISEY J. read a judgment in which he stated the facts and continued: It is contended on behalf of Sir Giles that the proper rate of tax must necessarily be the rate which has in fact been paid in respect of the sum out of which the discharge is to be effected, namely, 10s. in the pound. For the defendant, Olive Emily Lady Sebright, in relation to the first jointure, and also (I think) for the defendant, Alice Marion Sebright, in relation to the covenanted annuity, it is said that the tax to be deducted from the amount representing each half-yearly payment (or, in the case of the covenanted annuity, each quarterly payment), should be at the standard rate for the financial year in which that payment first became due and payable according to the tenor of the relevant appointment or deed. In other words, it is said that pre-war arrears ought to suffer deduction at the pre-war rates.

The solution of this question, which, to my mind, is one of difficulty, appears to depend on the proper interpretation of r. 19 of the All Schedules Rules in the Income Tax Act, 1918, as amended by s. 39, sub-s. 1, of the Finance Act, 1927, and particularly on the meaning to be attributed to the two words in the sub-section, "becomes due." I cannot think that the words mean the same as "becomes payable," that is, payable in fact as opposed to in right. I am disposed to think that either "became due" or "became or becomes due" would have been a more accurate expression than the one we have, but, notwithstanding all the difficulties of so holding, I have come to the conclusion that the effect of the rule in such a case as the present must be that the person entitled to the annual payment should, in regard to deduction of tax, be placed in the position in which he would have been if the payment had been made on the very day on which it became due. The person liable to make the payment may be in the position of having himself suffered a deduction at one rate while his own right of deduction and retention is at a different rate, that is to say, the rate which ruled at the time when the belated payment ought to have been made. It seems to be that the alteration of the rule by the Act of 1927 merely substituted a fixed rate for a rate arrived at by a day-to-day calculation. For example, a half-yearly payment falling due on May 1 in a year in which the rate of tax had been raised as from the preceding April 5 would, under the revised rule, be treated as wholly taxable at the new higher rate and not at the lower rate to April 5, and at the higher rate only thereafter. The cases do not seem to be of much assistance, but that is probably my fault. I have been referred to *Leigh* v. *Inland Revenue Commissioners* (1), and *Lambe* v. *Inland Revenue Commissioners* (2). I have some difficulty in understanding the observations of Lord Hanworth, M.R., in *Luipaard's Vlei Estate* v. *Inland Revenue Commissioners* (3). The point appears to be the one which was left open in *Champneys' Executors* v. *Inland Revenue Commissioners* (4), in which Romer L.J. said: "We have not "to determine what is the true operation of s. 39"—that is, of the Act of 1927—"in cases where interest is paid in a year "later than that in which it becomes payable, in the ordinary "sense of the word." See also *Allchin* v. *Coulthard* (5). If the rate of tax had been lowered instead of raised—if, for instance, the "available fund" had borne tax at 5*s.* while the "annual payment" would have been liable (had it been punctually paid) to tax at 10*s.*, it seems from the observation of the Lord Chancellor in the last-mentioned case (6), that the

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(1) (1739) 1 Atk. 561.
(2) (1763) Ambler 424.
(3) [1905] 1 Ch. 726.

(1) [1928] 1 K. B. 73.

(2) [1934] 1 K. B. 178, 185.

(3) [1930] 1 K. B. 593, 609.

(4) (1934) 19 Tax Cas. 375, 389.

(5) [1942] 2 K. B. 229; [1943] A. C. 607.

(6) [1943] A. C. 622.

payer's right of deduction would be limited to the lower rate of tax. Notwithstanding the various judicial expositions on the subject of r. 19, I confess that it remains, to my mind, not easy of comprehension. The view which I have formed appears to me to be more reasonable than any other and I propose to act on it.

The other question is whether the jointures are subject to, or free from, succession and estate duties. The direction contained in each deed of appointment for payment " without " any deduction " would, as a matter of construction, exonerate the jointures from both these duties. As to succession duty, see *In re Saunders* (1), *In re Egmont's Settled Estates* (2), and *In re Higgins* (3). As to estate duty, see *In re Parker-Jervis* (4). There is, I think, no doubt at all of the intention of the appointors, but the question is whether they exceeded the power. Did they, that is to say, by reason of the direction, go beyond the permitted limit of 600*l.* ? The contention that they did so is supported by some authorities of great weight: see *Hervey* v. *Hervey* (5), and *Londonderry* (*Lady*) v. *Wayne* (6), also Davidson's Precedents on Conveyancing, 3rd ed., vol. III., pt. 1, p. 472, et seq ; Sugden on Powers, 8th ed., p. 704, et seq. I am, however, faced with a recent decision of Bennett J., namely, *Re Smith-Bosanquet* (7), which I consider, after some hesitation, covers the present case, and I shall follow it. It is true that there are differences between that case and this, and that the allocation of a particular part of an income is not the same thing as the creation of a jointure rent-charge, but I cannot discover any difference between them in principle. At any rate, as regards estate duty, the decision is one which I feel bound to follow. As regards succession duty, I thought at one time that this stood on a different footing as being a more direct imposition on the jointress as a " successor," and was, therefore, perhaps, not so aptly described as a " deduction " as estate duty is, but on the whole I think I can make no distinction between the two. I will declare that the jointures have been effectually exonerated from both duties.

As to costs, I agree that these questions really affect income rather than capital, but it would hardly be fair to impose them on current income, and I cannot very well spread the burden over a number of years. On the whole, I think it right to order that the costs of all parties as between solicitor and client shall be paid out of capital moneys.

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(1) [1898] 1 Ch. 17.
(2) [1912] 1 Ch. 251.
(3) (1885) 31 Ch. D. 142.
(4) [1898] 2 Ch. 643.
(5) (1739) 1 Atk. 561. Also reported in 9 Mod. 225, sub nom., *Harvey* v. *Harvey*.
(6) (1763) Amb. 424.
(7) [1940] Ch. 954.

Solicitors: *Fladgate & Co.; J. N. Nabarro & Sons; Burton, Yeates & Hart; Rooper & Whately.*

H. L. L.

MORTON J.
1944
Mar. 22.

In re FERRIER.

Ex parte THE TRUSTEE *v.* DONALD.

Sale of goods—Delivery to buyer "on sale for cash or return"—Passing of property to buyer—Execution levied on goods before date fixed for return and while still in possession of buyer—Sale of Goods Act, 1893 (56 & 57 *Vict., c.* 71), *s.* 18, *r.* 4 (*b*).

In November, 1941, articles of furniture were delivered by a dealer to X. "on sale for cash or return" within a week. Two days after the delivery of the goods execution was levied on the goods of X., on behalf of two creditors, and the articles were seized:—

Held, that, after the date of the execution, X. had not retained the articles within the meaning of s. 18, r. 4 (*b*), of the Sale of Goods Act, 1893, so that they never became her property and the dealer was entitled to them.

MOTION.

On November 11, 12 and 13, 1941, Mrs. Eily Donald, who carried on business as a dealer in antique furniture, delivered certain articles of furniture to Mrs. Mata Ferrier on sale for cash or return within a week. On November 15, 1941, execution was levied on the goods of Mrs. Ferrier, and the articles delivered by Mrs. Donald were among the goods seized. On December 3, 1941, the sheriff interpleaded, and on December 8, 1941, Mrs. Donald made an affidavit in which she claimed the articles on the ground that they had been bona fide delivered to Mrs. Ferrier on sale for cash or return within a week. On December 16, 1941, Master Horridge heard the interpleader issue and ordered the sheriff to withdraw from possession of the articles claimed by Mrs. Donald, who recovered possession of them. On March 31, 1942, a receiving order was made against Mrs. Ferrier, and on April 24, 1942, she was adjudicated bankrupt and a trustee of her estate was appointed. The trustee, relying on s. 18, rule 4 (*b*), of the Sale of Goods Act, 1893 (1), applied to the court by motion for a declaration that on November 20, 1941, the property in the articles became and was vested in Mrs. Ferrier and had at all material times since remained so vested.

Gallop for the trustee.
G. D. Johnston for Mrs. Donald.

MORTON J., after stating the facts: I now turn to the question of law raised by Mr. Gallop for the trustee. He referred me to certain answers given by Mrs. Donald to the effect that the articles were sent to Mrs. Ferrier on sale for cash or return, and that Mrs. Ferrier was given a week to decide whether she would take the articles or return them. He directed my attention to the Sale of Goods Act, 1893, s. 18, r. 4, and submitted that there was no difference for the purpose of this case between the words " on sale or return " and the words " on sale for cash or return." Mr. Johnston did not argue to the contrary, and I assume that there is no distinction for the present purpose between the two phrases. Mr. Gallop contended that, as the goods were delivered on sale or return, and the time fixed for their return had expired on November 20, 1941, and Mrs. Ferrier had retained them without giving notice of rejection, the property in them passed to her on that date, and that there was nothing to show a different intention within the meaning of s. 18.

I think that there is a very short and simple answer to that argument. I do not take the view that Mrs. Ferrier retained the goods until November 20, 1941, within the meaning of

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(1) By Sale of Goods Act, 1893, s. 18: " Unless a different intention appears, the following are " rules for ascertaining the intention of the parties as to the " time at which the property in " the goods is to pass to the " buyer . . . . Rule 4.—When " goods are delivered to the buyer " on approval or ' on sale or " ' return ' or other similar terms " the property therein passes to " the buyer . . . . (*b*) if he does " not signify his approval or " acceptance to the seller but " retains the goods without giving " notice of rejection, then, if a time " has been fixed for the return of " the goods, on the expiration of " such time, and, if no time has " been fixed, on the expiration of a " reasonable time. What is a " reasonable time is a question of " fact."

s. 18, r. 4. She retained them until November 15, 1941, when, according to the trustee's own evidence, the goods were seized under the execution. From that time on I think that the goods were "retained" by the sheriff, and were so retained until, pursuant to the order of the master, he withdrew from possession of them. The event which is referred to in r. 4 of s. 18 never happened, and the goods simply remained goods which had been sent on sale or return and which never became the property of Mrs. Ferrier. These goods were handed back to Mrs. Donald pursuant to the order of Master Horridge, and, in my view, she is entitled to retain them.

There is a further point, taken by Mr. Johnston, which seems to me not unattractive, but it is not necessary to decide the soundness of it because the reason which I have given is sufficient for rejecting Mr. Gallop's argument. Mr. Johnston suggests that under s. 26 of the Act the execution bound whatever property the execution debtor had in the goods and that the right which the execution debtor had, at the time of the execution, to accept or reject them was bound by the execution. From that time on, he suggests, the sheriff could have sold that right. Whether that be so or not, I think that section tends to confirm my view that, from that time on, it was the sheriff and not the execution debtor who was retaining the goods. The motion will be dismissed, with costs.

Solicitors: *Lucien Fior ; Frere, Cholmeley & Co.*

J. L. D.

In re ROGERS, DECD.

LLOYD'S BANK, LIMITED *v.* LORY AND OTHERS.

C. A.

1944

April 21

Lord Greene M.R., MacKinnon and Luxmoore L.JJ.

Will—Legacy—Vested or contingent interest—Gift to infant on attaining twenty-one—Direction to pay income to his mother for his "advancement and education"—Death of infant during infancy.

A testator left a fund to his trustees in trust for his wife for life and after her death in trust for his grandson on attaining the age of twenty-one years, but, if the testator's wife should die before his grandson attained twenty-one, he directed that the income should be paid to the mother of the grandson for his "advancement

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" and education." The testator's wife predeceased him. The grandson survived the testator, but died in childhood :—

Held, that the gift to the grandson was contingent on his attaining twenty-one and did not become vested by the direction to pay the income to his mother, she not being thereby made a trustee for him and he not acquiring a beneficial interest in the whole income during his minority.

Decision of Vaisey J. affirmed.

APPEAL from Vaisey J.

By his will, dated January 12, 1940, the testator, Thomas Rogers, appointed Lloyd's Bank, Ld., to be his executor and trustee, and devised and bequeathed to them the whole of his real and personal estate on the usual trust for sale and conversion and thereafter (so far as material) " upon trust to " hold the sum of 2,000*l.* (free of duty) . . . . and to pay the " income thereof to my wife Susan Rogers during her life " and after her death as to both capital and interest in trust " for my grandson Ian Roger Pearson . . . . on his attaining " the age of twenty-one years Provided that should my wife " die before the said Ian Roger Pearson shall attain the age of " twenty-one years then I direct the bank to pay the income " of such fund to his mother Sadie Pearson for the advancement " and education of the said Ian Roger Pearson." The testator gave the residue of his estate to his wife, Susan Rogers, absolutely, but if she should predecease him, then, subject to a devise of realty to Mrs. Pearson and to pecuniary legacies to her and other persons, he bequeathed the residue to the defendants Alice Lory and Richard Coad equally. Susan Rogers died on August 4, 1941, and the testator on November 23, 1941. On March 23, 1943, the infant, Ian Roger Pearson, died, aged ten years. On a summons taken out by the bank Vaisey J. held that the gift to the infant was contingent on his attaining twenty-one, and that the fund, therefore, passed to the residuary legatees of the testator and not to the defendants, Mrs. Pearson and her husband, as personal representatives of the infant. Mr. and Mrs. Pearson appealed.

Gray K.C. and *George Maddocks* for Mr. and Mrs. Pearson. This gift was vested in the infant and on his death passed to his next-of-kin. It is not disputed that the words " on " attaining the age of twenty-one years " are prima facie contingent, but it is well settled that, if the whole intermediate income is given for the maintenance of the person contingently entitled, the gift is treated as vested: see per Astbury J. in *In re Ussher* (1), citing *In re Turney* (2) where *Fox* v. *Fox* (3) was approved. A fortiori is this so where the gift is for "advancement and education." This is a question of the testator's intention. Clearly he intended to say: "This is "the infant's money, but if he comes into it before he is "twenty-one it cannot be paid to him. In that case, the "trustees, instead of applying it themselves, are to pay it "to his mother to be applied by her." This did not give the mother any beneficial interest in the money. The mere fact that a parent is not intended to account is not enough to show a beneficial interest in the parent, and there is no general principle that where income is given to a parent for the maintenance of an infant, the parent is given an interest in the fund. The fact that the infant's mother in the present case was entitled to any surplus income or that indirectly her own income was relieved pro tanto of the cost of education, does not make her a beneficiary. The decision in *Browne* v. *Paull* (4) is based on the construction of the particular will which was very different from this one. [They referred also to *Berkeley* v. *Swinburne* (5), *Hadow* v. *Hadow* (6) and *In re Delahunty* (7)]. *Hammond* v. *Neame* (8) was a very special case and the statement in Jarman on Wills, 7th ed., vol. 2, p. 868: "It appears, as the result of these authorities, that "where the interest of the children's legacies is given to a "parent to be applied for or towards their maintenance and "education, there, in the absence of anything indicating a "contrary intention, the parent takes the interest subject to "no account, provided only that he discharges the duty "imposed upon him of maintaining and educating the "children" is put much too strongly. On the construction of this will there is nothing to show that the mother was intended to take a beneficial interest, and the gift was vested in the infant.

Roxburgh K.C. and *Lightman* for the residuary legatees. It is conceded that, if during the whole period of contingency the whole income is devoted to the contingent legatee, that operates to effect a vesting of the legacy, but the operative factor is the completeness and continuity of his interest in the income. The test is whether the income is to be applied during the whole of the contingency, not whether it is to be applied for "maintenance"; see *Fox* v. *Fox* (1) where Jessel M.R. cited *Watson* v. *Hayes* (2). If, however, for any period of time during the contingency someone else has any interest, the test fails, and there can be no vesting of the legacy. The question whether any person other than the infant has any interest in the income during the contingency is a question of construction. In *Browne* v. *Paull* (3) the reason for regarding a parent as beneficially entitled is explained, and on that basis there was a beneficial gift to the mother in the present case. It has been suggested that there are only two possible classes of gift to the mother: (1.) as trustee for the infant; or (2.) a beneficial gift subject to words indicating motive. There is a third possibility—a beneficial gift coupled with words of charge which a court of equity could enforce. It is sufficient for us if we can bring the case within either (2.) or (3.). This is a very special case; the gift is of income, not capital as in *In re Delahunty* (4). Where a gift of income is under consideration there is no difference between "maintenance," "maintenance and advancement," or "maintenance, advancement and education." The test is not whether a parent is liable to account, for accountability in relation to education might be as impossible as accountability in regard to maintenance. Other considerations may apply to advancement out of capital where the word has a comparatively narrow sense which cannot have been intended here, for the words used are "advancement and education," not "education and advancement." In point of time, education must precede advancement in the narrower sense. Therefore, when "advancement" is mentioned in a gift before "education," the term "advancement" loses that special "capital flavour," and must be interpreted in the general sense of "benefit," thus including an element of maintenance.

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(1) [1922] 2 Ch. 321.
(2) [1899] 2 Ch. 739.
(3) (1875) L. R. 19 Eq. 286.
(4) (1850) 1 Sim. (N. S.) 92.
(5) (1834) 6 Sim. 613.
(6) (1838) 9 Sim. 438.
(7) [1907] 1 I. R. 507.
(8) (1818) 1 Swanst. 35.

Hubert Rose for the plaintiffs.

Gray K.C. in reply. "Advancement" is a well-known legal term, with a definite meaning. The question is not whether the sums in question are paid out of capital or income, but for what they are applied.

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(1) L. R. 19 Eq. 286, 288.
(2) (1839) 5 My. & Cr. 125.
(3) 1 Sim. (N. S.) 92.
(4) [1907] 1 I. R. 507.

LORD GREENE M.R. The question for decision is whether the gift in favour of the infant was a vested gift so that on his death it passed to his next-of-kin, or whether it was contingent on his attaining the age of twenty-one. It is not disputed that the opening words of the gift import contingency, but it is well settled that such words may have their meaning and effect altered by accompanying provisions. The question which we have to decide is whether Vaisey J. was right in holding that, on the true construction of this will, the gift was contingent. If the true construction of the direction is that the infant was to have the beneficial interest in the whole of the income before he attained the age of twenty-one years, then the gift must be treated as vested. It is said that that is not the true construction because the words of the will must be construed, not as a gift to the infant's mother as trustee for him, but as a gift to her beneficially, subject to a charge for his advancement and education. In other words, so long as his advancement and education are provided by his mother, the court has no power to interfere with her use of the income. In that case the rule to which I have referred does not apply.

A number of cases were referred to and I need not deal in detail with them. There has been a long-standing method of judicial construction of gifts of this kind, the correctness of which has not been challenged. What may be regarded as the leading case is *Browne* v. *Paull* (1), decided by Lord Cranworth V.-C. In that case there was a direction to the testator's trustees " to pay, unto my said wife, or otherwise " apply the rents and proceeds of the respective shares and " interests of my said children, in my said estate and effects, " for or towards their respective maintenance, education, and " advancement." The widow maintained and educated the children, and advanced some of them, and the question arose whether she was accountable for surplus income. Lord Cranworth treated the matter as a pure question of construction of the gift and, after referring to *Berkeley* v. *Swinburne* (2) and *Hadow* v. *Hadow* (3) where it was decided " that, where the " interest of the children's legacies is given to a parent, to

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(1) 1 Sim. (N. S.) 92.
(2) 6 Sim. 613.
(3) 9 Sim. 438.

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"be applied for or towards their maintenance and education, "there, in the absence of anything indicating a contrary "intention, the parent takes the interest subject to no account, "provided only that he discharges the duty imposed on him "of maintaining and educating the children," he gives his own reasons for accepting that principle (1): "It is always extremely improbable that a testator can mean that a parent "shall keep an accurate account of all money expended in the "maintenance and education of a child, forming, as that "child ordinarily does, part of the parent's establishment. "The great probability always is that nothing more was "intended than that the parent should adequately maintain and "bring up the child: and I have no hesitation, therefore, in "following the two decisions I have referred to."

The question, therefore, is one of construction, and it would not be right in this court to adopt a different method of approach from that which has been adopted for so many years. If the case is one of the category where it is extremely improbable that the testator would have intended the parent to be responsible as a trustee, he ought not to be made so. If the word "maintenance" had appeared, there could have been no doubt, for "maintenance and education" are the very words used by Lord Cranworth in *Browne* v. *Paull* (2) when he said that they precluded the possibility of the construction that the parent should be regarded as a trustee for the child. I thought at one stage that the words "advancement and education" might have fallen in a different category as matters which could easily be made the subject of account, but Mr. Roxburgh has satisfied me that that is a distinction for which there is no justification in the present case. Part of the expenses of "education" may be easily accountable, but part may not, but may involve apportionment of payments between "education" and "maintenance." So, with regard to "advancement," though Mr. Roxburgh said the word has "a capital "flavour," where it applies to income I do not think one can exclude expenses of an "income flavour."

I think, therefore, that the mother of the infant was not a trustee of the income for him, and that Vaisey J. was right in thinking that the words of this gift were not sufficient to make the contingent gift into a vested one. The appeal must be dismissed.

(1) 1 Sim. (N. S.) 92, 104.

(2) Ibid 92.

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MACKINNON L.J. I agree.

LUXMOORE L.J. I agree.

Appeal dismissed.

Solicitors for Mr. and Mrs. Pearson: *Bower, Cotton & Bower, for George Davies, Manchester.*

Solicitors for the residuary legatees and for the plaintiff bank: *Gard, Lyell & Co., for Theodore Bell, Cotton & Curtis, Cheam.*

J. W. H.

In re PICTON, DECD.

PORTER *v.* JONES.

COHEN J.
1944
April 19; *May* 2.

Will—Residue to pecuniary legatees in proportion to legacies—Codicil revoking some legacies and substituting new legacies—Confirmation of will—Effect on residuary bequest.

A testator who, by his will, had given a number of pecuniary legacies, and the residue between all the legatees pro rata according to their legacies, by a codicil thereto revoked seven of these legacies, and "in lieu thereof" bequeathed legacies of amounts differing from those in the will to five of the legatees, the other two legatees receiving no legacies in substitution. He also bequeathed three further legacies to legatees not mentioned in the will.:—

Held, that the will and codicil ought to be read together as one document, brought down to the date of the codicil, and that, so read, the legatees whose legacies were revoked by the codicil but who received substituted legacies and the legatees whose legacies were given only by the codicil were entitled to participate in the distribution of the residuary estate according to the amount of their substituted or their new legacies, but that the legatees whose legacies were revoked by the codicil and who received no substituted legacies were not entitled so to participate.

In re Courtauld (1882) 47 L.T. 647; *In re Smith* [1916] 1 Ch. 523; and *In re Tredgold* [1943] Ch. 69 applied. *In re Florence* (1917) 117 L.T. 701 distinguished.

ADJOURNED summons.

By his will, dated May 23, 1941, the testator, Jacob Marsden Picton, appointed the plaintiffs as his executors and trustees. After giving directions for the realization of his estate and the payment of his debts and funeral and testamentary expenses he bequeathed a number of pecuniary legacies. The will concluded as follows :—" All the rest residue and remainder of " my real and personal estate of whatsoever nature or kind the " same may be I give unto and between the above-mentioned " legatees including my trustees pro rata according to the " legacies left to them by me in this my will." By a codicil dated April 12, 1943, the testator recited that he had by his will bequeathed the legacies mentioned, and, by cl. 2, he revoked those legacies, and " in lieu " thereof bequeathed legacies of different amounts (all but one larger) to all the legatees except two, Stephen Picton and Henry Graham Daniel, and in addition gave to his nephew, Stephen Jenkins, all his wearing apparel. Stephen Picton and Henry Graham Daniel received no legacies, but, by cl. 3, the testator bequeathed the following legacies all free of legacy duty :—" To my nephew " Thomas Picton the son of my brother Stephen Picton " 300*l*. . . . . to the wife of Henry Graham Daniel 100*l*. and " to Clara Williams 100*l*." The testator died on June 27, 1943, and on July 27, 1943, probate was granted to the executors of his will. The trustees took out the present summons to determine whether any, and if any, what shares were taken in the residuary estate by (*a*) legatees whose legacies were revoked by the codicil, but who received substituted legacies of different amounts, (*b*) legatees whose legacies were revoked and who received no substituted legacies, (*c*) legatees whose legacies were given only by the codicil.

Vanneck for the trustees.

G. D. Johnston, H. H. King, Geoffrey Cross, Skone James, Stranders (for *Danckwerts*), *Belsham, Michael Bowles, and Richmount* for defendants.

The arguments and authorities cited appear fully in the judgment.

Cur. adv. vult.

May 2. COHEN J. read a judgment in which he stated the facts, and continued : If the matter were free from authority I should feel no doubt that the intention of the testator as expressed in this will and codicil was to substitute for all purposes the legacies given by the codicil for those thereby revoked, and that, therefore, all the persons who received legacies under cl. 2 and 3 of the codicil were entitled to participate in the distribution of residue. The matter, however, is not free from authority, and I must, therefore, consider whether there is anything in the authorities which prevents me arriving at the conclusion I have indicated.

So far as those who receive substituted legacies are concerned my prima facie view is supported by the reasoning of the decision in *In re Courtauld* (1). In that case the testator had bequeathed legacies of 70,000*l.* and 80,000*l.* respectively on certain trusts in favour of adopted daughters, and, after declaring that the term " the said residuary legatees " should be considered to designate all persons thereinbefore named as pecuniary legatees, he bequeathed his residuary estate in trust for and to be divided among " the said residuary legatees " pro rata in proportion to the amount of the legacies thereinbefore bequeathed to the said residuary legatees respectively. By a codicil he revoked each of the above-mentioned legacies and "in substitution for and not in addition to the same" gave legacies of 80,000*l.* and 140,000*l.* respectively on the same trusts as the original legacies. Kay J. stated the question raised in the following terms (2) :" Now, the scheme of the will " was obviously this, to give certain pecuniary legacies to " different legatees, and then to divide what might be left of " his personal estate among the legatees in those proportions " which tne amounts of their pecuniary legacies had determined. The question is whether, having by this codicil revoked " two of those legacies . . . . and having substituted another " legacy which is to be held, as I have already determined, " upon the same trusts as the former legacies in all respects " . . . . and in the same manner as if they were here repeated " —whether that is a substitution for the previous legacy, not " merely so far as relates to the trusts of and incidental to that " particular legacy, but also so as to occasion a different division " of the residue from that which would have been made if this " revocation of the legacy had not taken place at all." After rejecting the suggestion that the effect of revoking the original legacies was to revoke the gift of any share of residue to the particular legatees, he said : " I think on the whole, in the " absence of authority, I am bound to give to the word " ' substitution ' its largest meaning, and to read the will and " codicil as one is bound to do, as one document, and to treat " the words of the testator as if he said : I direct that these " increased legacies shall be read as if they were inserted in the

(1) (1882) 47 L. T. 647. (2) 47 L. T. 650.

"will for all purposes; in which case the residue must be divided "amongst the legatees as if their original legacies had been the "amounts mentioned in the codicil, and not in the will."

In my opinion, the expression "in lieu thereof" in cl. 2 of the codicil in the present case is identical in effect with the words "in substitution for" in *In re Courtauld* (1), and the legatees named in that clause are entitled to participate in the distribution of the residuary estate according to the amount of their substituted legacies.

I turn now to the position of those legatees whose legacies were revoked and to whom no substituted legacies were given by the codicil. Mr. Stranders, on their behalf, relied on the decision in *In re Florence* (2). In that case the testator, by his will, gave legacies of 10,000*l.* each to three institutions and legacies of 1000*l.* each to ten other institutions, and directed that his residuary estate should, subject to a life interest therein, be divided between the institutions naming them in proportion to their respective legacies. By a codicil he revoked the legacies of 1,000*l.* each to nine of the institutions and in all other respects he confirmed his will. Shortly before the execution of that codicil he had given to each of seven of the hospitals whose legacies were revoked 1,000*l.* Corporation of London 3½% stock, but he made no such gift to the remaining two hospitals. The question arose whether the nine hospitals were entitled to participate in the distribution of the residuary estate. Younger J. held that they were so entitled. He pointed out that the authorities decided that the dispositions of a will are not to be disturbed more than is necessary to give effect to a revocation by codicil, and held that, on the true construction of the will before him, the provision as to the division of the residue was inserted as a convenient way of showing the actual proportions in which the particular fund was divided between the named institutions, or, alternatively, that the proportions of their respective legacies meant in the proportions of their respective legacies as hereinbefore named, that is, altogether irrespective of whether the legacies were received or not or were effective or not, because that contingency was not in that respect present to the testator's mind as a consequence of any importance. At first sight this case seems an authority in support of Mr. Stranders' contention. It is difficult to reconcile with *In re Courtauld* (1), but there is this salient difference that in *In re Florence* (1) there was not, as there was in *In re Courtauld* (2), a substitution of other legacies for the revoked legacies. In my judgment, where there is such a substitution it means prima facie a substitution for all the purpose of the will including the right to participate in the division of residue where residue is directed to be divided in proportion to the legacies left to the pecuniary legatees by the will. In my view, therefore, Mr. Stephen Picton and Mr. H. G. Daniel are not entitled to participate in the division of residue.

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(1) 47 L. T. 647.

(2) (1917) 117 L. T. 701.

Finally, I turn to the position of Thomas Picton, Mrs. Daniel, and Miss Williams. I have come to the conclusion that, on the true construction of the will and codicil, the intention of the testator as expressed therein was that these legatees should take the place for all purposes of Mr. Stephen Picton and Mr. H. G. Daniel. I think that the words " in lieu " in cl. 2 are meant to cover, not only the legacies particularly mentioned in cl. 2, but also the new legacies given in cl. 3 of the codicil. In this connexion it is, perhaps, not an irrelevant fact that Mr. Thomas Picton is described as a son of Mr. Stephen Picton and is receiving the exact amount of the legacy bequeathed to his father by the will and that Mrs. Daniel is the wife of H. G. Daniel and is receiving one half of the legacy originally bequeathed to him, the other half going to Miss Williams.

I think the conclusion which I have reached can be supported on another ground. Mr. Skone James, who appeared for Miss Williams, called my attention to a series of authorities dealing with the effect of confirmation of a will by a codicil. I will refer only to two of them—*In re Smith* (3) and *In re Tredgold* (4). In *In re Smith* (3) the testatrix, by her will, gave a number of specific and pecuniary legacies, and directed that no legacy given by her will should lapse by reason of the death of the legatee before her death, but should take effect as if the death of such legatee had happened immediately after her death and such legacy should, accordingly, pass to the legal personal representatives of such deceased legatees. She made seven codicils to her will each of which contained an express formal clause confirming in other respects her will and any previous will or codicil. Sargant J. said (5): " It is well settled law that when " a codicil expressly confirms a will the effect is, in the words

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(1) 117 L. T. 701.
(2) 47 L. T. 647.
(3) [1916] 1 Ch. 523.
(4) [1943] Ch. 69.
(5) [1916] 1 Ch. 530.

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"of North J. in *In re Champion* (1), 'to bring down the date "'of the will to the date of the codicil, and to make the devise "'in the will operate in the same way in which it would have "'operated if the words of the will had been contained in the "'codicil of later date.' This decision was affirmed in the "Court of Appeal, and the principle has been given full effect "to in such cases as in *In re Rayer* (2) and in *In re Fraser* (3). "It is indeed urged here that the words 'by this my will' point "to a particular instrument or writing, namely, the will itself, "and that therefore the saving clause is limited by its very "terms to the legacies given by the will itself. But I think that "this is too narrow a construction. In my view the will itself is "alone named in the clause merely because at the time that was "the only instrument containing the testatrix's testamentary "dispositions. I cannot find in the phrase any intention to "denote the particular instrument alone or to exclude from "the application of the clause any legacies which should under "codicils confirming the will form part of the testatrix's ultimate testamentary dispositions. The will being brought "down to date by the confirming codicils and forming together "with them one complete disposition, the legacies given by the "codicils come, in my judgment, within the description legacies "'given by this my will.'" In *In re Tredgold* (4) the question arose as to the effect of a bequest of 500*l.* a year clear of income tax having regard to the provisions of s. 25 of the Finance Act, 1941, under which a provision for the payment of a stated amount free of income tax is reducible if the provision is contained in a will or codicil made before September 3, 1939, and has not been varied on or after that. The will in question was made before September 3, 1939, but, it having been confirmed by a codicil made after that date, Simonds J. had to consider the effect of the confirmatory clause and he stated the question in these terms: "If a testator thus shows that he wishes his "codicil to be read as part of his will, it follows that he is "re-asserting his testamentary intention. He is republishing "his will, and, by a somewhat artificial doctrine, the result of "such republication is that for certain purposes the will must "be construed and take effect as if it had been executed at the "date of republication: see Sir William Grant's exposition of "the law in *Pigott* v. *Waller* (5). But the republication of a

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(1) [1893] 1 Ch. 101, 109.

(2) [1903] 1 Ch. 685.

(3) [1904] 1 Ch. 726.

(4) [1943] Ch. 69.

(5) (1802) 7 Ves. 98, 117.

" will did not always and for all purposes have this effect. " Whether it did so or not was a question of construction : see, " for example, *Doe* v. *Walker* (1), where for this purpose great " importance was attached to the words : ' In all other respects " ' I ratify and confirm my said will.' " After reviewing the authorities, Simonds J. came to the conclusion that the effect of the confirmatory clause was that the provision of the widow's annuity must be regarded as having been contained in a document, the codicil, which was made after September 3, 1939, or, if not, was made in two documents, the will and codicil, which are to be regarded as one document made at the date of the codicil.

Applying the principles laid down in the cases I have cited to the will and codicil before me, I think that I am fortified in the conclusion which I have already reached that the residuary estate of the testator is divisible among the legatees named in the will and codicil other than those whose legacies were revoked by the codicil and who received no substituted legacies, and that such division must be made in proportion to the amounts bequeathed to them by the will as varied by the codicil. In conclusion, I would add that it follows from the decision I have already given that the defendant, Stephen Picton, is entitled to share in the residuary estate in respect of the specific legacy given to him by the codicil.

Solicitors : *Farrar, Porter & Co.; Burton, Yeates & Co., for J. F. Morris, Son & Lloyd, Carmarthen ; T. D. Jones & Co., for Nicholas & Evans, Cardiff ; Helder, Roberts, Giles & Co., for Morgan Griffiths, Son, & Prosser, Carmarthen.*

(1) (1844) 12 M. & W. 591.

H. L. L.

MORTON and COHEN JJ.

1944

April 3, 27.

In re PASCOE.

Ex parte TRUSTEE OF THE BANKRUPT *v.* LORDS COMMISSIONERS OF HIS MAJESTY'S TREASURY.

Bankruptcy—Debt provable in bankruptcy—Fine after conviction of criminal offence—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 30, *sub-s.* 3.

A bankrupt was convicted of bribery and ordered to pay a fine :—

Held, that the fine, being a debt of record due to the Crown, was a debt provable in the bankruptcy under s. 30, sub-s. 3, of the Bankruptcy Act, 1914.

R. v. Woolf (1819) 2 B. & Ald. 609, referred to.

APPEAL from Newcastle-on-Tyne county court.

On August 26, 1920, a debtor was adjudicated bankrupt, and the official receiver at Newcastle-on-Tyne was appointed his trustee in bankruptcy. On June 18, 1942, the debtor was convicted at Newcastle assizes on seven charges of bribery and was fined 300*l.* on each charge. On November 24, 1942, a second receiving order was made against him, and on January 6, 1943, a trustee was appointed in the second bankruptcy. On January 25, 1943, a proof of debt, which had been lodged on behalf of the Crown, claiming that the debtor was indebted to the Crown in the sum of 2,100*l.*, in respect of the fines, was admitted by the trustee to rank for dividend for that sum. After further consideration, however, the trustee took the view that the fine was not a debt provable in the bankruptcy within s. 30, sub-s. 3, of the Bankruptcy Act, 1914 (1), and that the proof should not have been admitted. He, therefore, applied by motion to the Newcastle-on-Tyne county court for a declaration that the proof was improperly admitted and should be expunged. On February 11, 1944, the county court judge dismissed the application. The trustee appealed.

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(1) By Bankruptcy Act, 1914, s. 30: "(1.) Demands in the "nature of unliquidated damages "arising otherwise than by reason "of a contract, promise, or "breach of trust shall not be "provable in bankruptcy. (2.) A "person having notice of any act "of bankruptcy available against "the debtor shall not prove "under the order for any debt or "liability contracted by the "debtor subsequently to the date "of his so having notice. (3.) Save "as aforesaid, all debts and "liabilities, present or future, "certain or contingent, to which "the debtor is subject at the date "of the receiving order, or to "which he may become subject "before his discharge by reason "of any obligation incurred before "the date of the receiving order, "shall be deemed to be debts "provable in bankruptcy."

J. W. Morris K.C. and *Aronson* for the trustee. The fine is a punishment imposed by the court and is not the type of debt which is provable in bankruptcy within s. 30, sub-s. 3. The Bankruptcy Acts deal only with civil debts and criminal matters are left to be dealt with under other statutes. *R.* v. *Woolf* (1) lays down the proposition that a fine is a debt due to the Crown and a debt of record: see also the Debtor's Act, 1869, s. 4, and Williams on Bankruptcy, 15th ed., p. 824. As it has not in any respect the attributes of a civil debt, proceedings could not be taken in a civil court to recover it, and it is in a different position from certain penalties, which are recoverable in a civil court: see Customs Consolidation Act, 1876, s. 186; Customs and Inland Revenue Act, 1879, s. 11; and Income Tax Act, 1918, s. 146. [They also referred to *A.-G. for Northern Ireland* v. *Mines* (2); and Annual Practice, 1943, p. 2396.] The difference between a fine of this kind and a civil debt is further illustrated by the following authorities: *Bancroft* v. *Mitchell* (3); *Ex parte Graves* (4); *R.* v. *Paget* (5); and *R.* v. *Stewart* (6). If a fine were a debt provable in a bankruptcy, the bankrupt would on discharge be discharged from the fine: see Williams on Bankruptcy, 15th ed., p. 136; and that is not so. The procedure set out in ss. 6 and 40 and in r. 21 of sch. II. to the Bankruptcy Act, 1914, is not appropriate to a fine, and that is a further indication that fines are not contemplated by that statute as being debts provable in a bankruptcy. Money due under an order of court for alimony provides another illustration of the type of debt which is not provable in bankruptcy. [They referred to Williams on Bankruptcy, 15th ed., p. 161; *Linton* v. *Linton* (7); *Ex parte Hawkins* (8); and *Kerr* v. *Kerr* (9).]

The fact that the Defence (Recovery of Fines) Regulations,

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(1) (1819) 2 B. & Ald. 609.
(2) [1943] N. I. 66.
(3) (1867) L. R. 2 Q. B. 549.
(4) (1868) L. R. 3 Ch. 642.
(5) (1881) 8 Q. B. D. 151.
(6) [1899] 1 Q. B. 964.
(7) (1885) 15 Q. B. D. 239.
(8) [1894] 1 Q. B. 25.
(9) [1897] 2 Q. B. 439.

1942, contain provisions enabling proof in bankruptcy to be made in the case of certain large fines—see St. R. & O., 963 of 1942—raises the question whether these provisions are necessary if, apart from their existence, a fine is provable in bankruptcy.

[They also referred to Mather on Sheriff and Execution Law, 3rd ed., p. 297.]

Sir David Maxwell Fyfe S.-G. and *B. J. M. MacKenna* for the Crown. This is a debt within s. 30, sub-s. 3, of the Bankruptcy Act, 1914, and it is not excluded by sub-ss. 1 and 2 of that section. It is a debt of record, due to the Crown, in respect of which civil proceedings can be taken : see Co. Lit. book 3, c. 8, s. 514; *Lincoln* (*Earl of*) v. *Fysher* (1); *R.* v. *Woolf* (2); see also Bac. Abr., vol. 2, p. 634. As the Crown cannot issue an execution against the property of a debtor, the Crown must have the compensating right of being able to share with the rest of the creditors in his property: see Williams on Bankruptcy, 15th ed., p. 482. *A.-G. for Northern Ireland* v. *Mines* (3) shows that, whether a debt is civil or criminal, it is a debt, and that any such distinction is immaterial. Although a debtor may have been discharged from the debt under s. 28 of the Bankruptcy Act, 1914, the Crown can, in view of the provisions of ss. 151 and 162 enforce payment of the fine against the debtor. With regard to the Defence (Recovery of Fines) Regulations, 1942, although large fines coming within these regulations are included among certain debts from which, under s. 28, sub-s. 1 (*a*), of the Bankruptcy Act, 1914, a bankrupt is not released by an order of discharge, the regulations must be regarded merely as penal regulations, established to deal with war problems, so that the position existing before the outbreak of the present war is not affected by them.

Morris K.C. replied.

MORTON J. [having stated the facts]: What we have to determine is whether or not the total fine imposed is a debt or liability provable in bankruptcy under s. 30, sub-s. 3, of the Bankruptcy Act, 1914. It is plain that sub-ss. 1 and 2 of s. 30 have no application to the fine in question. Sub-section 8

(1) (1595) Cro. Eliz., p. 581.
(2) 2 B. & Ald. 609.
(3) [1943] N. I. 66.

of s. 30 provides that "liability," for the purposes of the Act, shall include certain matters which do not include the fine in question.

In determining the question which I have stated, we have to arrive at a conclusion on three matters. First, was the fine a debt to which the debtor was subject at the date of the receiving order, according to the ordinary meaning of the word "debt"? Secondly, if so, is there any sufficient reason why the word "debt" in s. 30, sub-s. 3, should be given any other meaning than its ordinary meaning? Thirdly, if the fine was not a "debt" within the meaning of the sub-section, was it a "liability" within the meaning of the sub-section?

As to the first question, I feel no doubt that the fine was a debt if the word "debt" is to bear its ordinary meaning. It is a debt of record due to the Crown. In Coke upon Littleton, book 3, c. 8, s. 514, I find this passage: "In an action of "debt for a fine or amerciament in a leete, the defendant shall "not wage his law, because the leete is a court of record; "but in an action of debt for an amerciament in a court "baron the defendant shall wage his law, for that it is "no court of record." In Croke's Reports (Elizabeth) there is recorded an interesting case of *Lincoln* (*Earl of*) v. *Fysher* (1). The report says: "Debt for an amercement in a leet. And "counts, that he had a leet within his manor of Fokingham "of all resiants within the manor; and that at such a court "holden there before one J. Gustard his steward there, the "said steward speaking to the defendant that he was a suitor "there, and telling him that he ought to be sworn to enquire, "&c., the defendant contemptuously answered him, 'In "'saying so thou lyest:' and for this contempt the steward "imposed a fine of 20s. upon him; for which this action was "brought. The defendant pleaded nihil debet; and found "against him. And after verdict it was moved by Yelverton, "*serjeant*, that this was not any such contempt for which "there ought to be any fine imposed; for it is no more in effect "than 'Thou speakest untruly,' which one may say to "a steward without offence.—The court held it to be an "apparent contempt, and abuse unto him being a judge, and "in his authority; and that he himself might assess a fine for "such contempt; and that for such fines assessed by a steward "debt lies, without any prescription alleged to assess such

(1) Cro. Eliz. 581.

"fines, or to have such an action." That is to say, it was held that debt lay although the contempt was of the nature of a criminal contempt. We were also referred to *Rex* v. *Woolf* (1), which was decided before the Queen's Remembrancer Act, 1859, had been passed. In that case it was held that where a defendant to an indictment for a misdemeanor has received judgment of fine and imprisonment, a levari facias may issue immediately to take his goods in execution for the fine. In the course of his judgment, Abbott C.J. said: "The case cited was therefore an authority founded upon the "general principle of the law; and as by that authority it is "laid down that a levari facias may issue for a fine due to "the King, which is a debt on record. I do not entertain any "doubt of the legality of this writ." Bailey J., in his judgment, said: "Here there is a judgment that the defendant do pay "to the king a fine of a certain sum. By that judgment the "debt becomes a debt to the King, of record; and it is payable "to the king instanter. It is true that part of the judgment "is also, that if at the expiration of the imprisonment the "fine shall not be paid, he is to continue in prison until it "be paid; but that is only for a further remedy on behalf of "the Crown; and if we were to say that the Crown shall not "be at liberty to issue an immediate execution for its own "debt, we should place the Crown in a worse situation than "any subject. The case cited shows that the levari facias "from this court was the proper mode of proceeding." Best J. said: "I agree that this is a debt of record, due to "the king the instant the judgment is pronounced, and "it would be strange to say, where a debt is due, that there is "no remedy to recover it for the term of two years." The Queen's Remembrancer Act, 1859, provided a particular procedure for enforcing payment of a fine, but, in my view there is nothing in that Act to take away any common law right of the Crown which existed before it was passed. This fine being a debt of record due to the Crown, it seems to me that, unless we are to give a very special meaning to "debts" in s. 30, sub-s. 3, of the Bankruptcy Act, 1914, that word must include the fine in question.

I have, therefore, to consider the second question, namely, whether there is any sufficient reason why the word should be given a narrower meaning than that which is natural and ordinary. Counsel for the trustee argued that the Bankruptcy

(1) 2 B. & Ald. 609.

Act, 1914, deals with civil debts and leaves criminal matters to be dealt with under other statutes, and they have directed our attention to a number of sections of the Bankruptcy Act, 1914, and other Acts, and to the Defence (Recovery of Fines) Regulations, 1942. They have also directed our attention to certain authorities. They submitted that these Acts and regulations contained indications which should lead us to the conclusion that s. 30, sub-s. 3, of the Bankruptcy Act, 1914, was not intended to cover a fine such as the one which we are now considering. In his speech for the Crown, the Solicitor-General adopted what he described as the " pedestrian method " of dealing one by one with all the matters relied on as indications in favour of the view urged by counsel for the trustee. I propose to resist the temptation of following that course myself in this judgment. If I did so I should be bound to express obiter dicta as to the meaning and effect of a number of sections of the Bankruptcy Act, 1914, which it is not our task to construe. If difficulties emerge on other sections as a result of the decision of this court, they will have to be dealt with as and when they arise. I do not think that any of them are insoluble, nor do I think that it would serve any useful purpose to deal in detail with the argument based on sections other than s. 30. I propose simply to say, on that aspect of the matter, that, having carefully considered all the points put before us by counsel for the trustee, I cannot find any sufficient reason for failing to give to the word " debts " in s. 30, sub-s. 3, what seems to me to be its ordinary meaning—a meaning which would clearly include this debt of record due to the Crown. I cannot believe that, if the word " debts " in that sub-section had not been intended to include this particular debt of record, the legislature would have failed to make that matter clear.

With regard to the cases cited by Mr. Morris for the trustee, he conceded that there was no decision exactly in point and agreed that the nearest approach to an expression of opinion on the matter is to be found in *Ex parte Graves* (1). The headnote in that case says: " A debtor was convicted " under s. 6 of the Copyright Act for violations of copyright in " engravings, and sentenced to pay a fine, and in default was " imprisoned. After the conviction he executed a deed " of composition with his creditors, which was duly registered. " He then applied for discharge from prison :—Held, that

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(1) L. R. 3 Ch. 642.

"the process under which the debtor was arrested was of "a criminal nature, and not for a debt, and that he was "not entitled to his discharge." In his judgment, Page Wood L.J. said: "Whether the penalty would be provable "or not under the bankruptcy of the prisoner makes no "difference," and he did not express any view whether the penalty was or was not provable in the bankruptcy. Mr. Morris referred us to three cases dealing with alimony, and pointed out that, although payments of alimony might be regarded as being debts in the ordinary meaning of the word "debt," yet in those cases they were held not to be provable in bankruptcy. The cases were *Linton* v. *Linton* (1); *Ex parte Hawkins* (2); and *Kerr* v. *Kerr* (3). For my part, I think it is sufficient to say that the reasons given for the judgments in those cases supply a wholly sufficient explanation why the claims with which the court was dealing should not have been treated as debts provable in bankruptcy. I do not think that those decisions afford any reason why we should come to the conclusion that this fine is not provable in bankruptcy. As to the Defence (Recovery of Fines) Regulations, 1942, I do not think it would be right to attach any real weight to those regulations in construing s. 30, sub-s. 3, of the Bankruptcy Act, 1914. The regulations do not apply to an offence such as that committed by the debtor, but, apart from that, it seems to me that it would be very dangerous to reason as follows: "Those responsible for the order in council which "brought into effect the Defence (Recovery of Fines) "Regulations, 1942, appear to have thought that when the "Bankruptcy Act, 1914, said 'X' it really meant 'Y.' "Therefore, although the Bankruptcy Act says 'X' we shall "construe it as meaning 'Y.'" I do not propose to follow that line of reasoning. I think it may well be that certain provisions in the regulations were merely inserted ex abundantia cautelae because those responsible thought that there was a chance that X might be construed as meaning Y.

On the view I take, the third question—whether, if this is not a debt, it is a liability—does not arise. The word "liabilities" seems to me to be a very wide word, and I think that, if I had come to the conclusion that this fine was not a debt, I might have come to the conclusion that it was a liability. Although I am in general agreement with the

(1) 15 Q. B. D. 239.

(2) [1894] 1 Q. B. 25.

(3) [1897] 2 Q. B. 439.

learned county court judge, I do not agree with his view that s. 30, sub-s. 8 specifies the liabilities which were to be included in s. 30. I cannot read sub-s. 8 as in any way limiting or cutting down the meaning of the word "liabilities" as used in sub-s. 3. Sub-section 8 does not contain an exhaustive definition of the matters which are "liabilities" within sub-s. 3.

I entirely agree, however, with the observations of the county court judge that the fact that a fine is also a punishment does not make it any the less a debt, and I do not see why the Crown should be in a worse position than the subject in regard to proving for that debt in bankruptcy. In my view, this appeal should be dismissed.

COHEN J. I agree. If the view which my Lord has expressed were not correct, strange results would follow. The cases to which my Lord has referred and the passage in Coke upon Littleton establish that a fine is a debt of record on which the Crown can sue at law. Mr. Morris agreed that if, before the receiving order had been made, the Crown had sued the debtor for the amount of the fine and had obtained judgment, that judgment would have constituted a civil debt provable in bankruptcy. On this basis, if we were to accept Mr. Morris's argument and strike out the proof on the ground that the fine per se were not provable, there would be nothing in s. 7 of the Bankruptcy Act, 1914, to prevent the Crown from instituting proceedings against the debtor and obtaining judgment, and that judgment would be a civil debt. It could not be said that such a judgment constituted a debt to which the debtor was subject at the date of the receiving order within s. 30, sub-s. 3, of the Bankruptcy Act, 1914, but I see no reason why it should not be said that the debt was one to which the debtor had become subject before his discharge by reason of an obligation incurred before the date of the receiving order within the sub-section. It seems to me that a fine imposed by a court of criminal jurisdiction does fall within the meaning of the words "any obligation incurred." That being so, when the judgment was obtained, it would presumably be provable, and it would seem strange if the legislature had intended a result under which a debt, which was already a debt of record, had to be converted into a judgment debt before it could be proved. It may be argued that a claim in tort is an instance where the liability is not provable per se, but a judgment founded on that liability is provable. I do not,

MORTON and COHEN JJ.

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PASCOE, *In re.* *Ex parte* TRUSTEE OF THE BANKRUPT *v.* LORDS COMMISSIONERS OF H.M. TREASURY.

however, think that is a fair analogy, for a claim in tort clearly falls within the exception of unliquidated damages in sub-s. 1 of s. 30, whereas a fine is a debt of record for a sum certain. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Botterell & Roche, for Ingledew, Mather & Dickinson, Newcastle-on-Tyne; Treasury Solicitor.*

J. L. D.

SIMONDS J.

1944

Mar. 13, 30; *April* 26.

In re VON KANTZOW'S PATENT.

Patent—Extension of term—War—Interference with sales—Foreign patentees—Manufacture abroad—Expiration of patent abroad—No disclosure of profits made abroad—Patents and Designs Acts, 1907–1942, *s.* 18, *sub-s.* 6.

The foreign patentees of certain alloys manufactured abroad and sold in Britain under an agreement with English agents applied for an extension of the term of the patent, on the ground that they had suffered loss by reason of the war. The original foreign patent, as well as the English patent, had expired. The patentees admitted that during the war they had made increased profits abroad, but said that they were unable to furnish any particulars of such profits as they were prohibited by their own municipal law from doing so:—

Held, that, taking all the circumstances into consideration, and particularly the manufacture abroad, the expiry of the foreign patent, and the inability of the patentees to furnish essential information to the court, although the case for some extension was in other respects made out, in the exercise of the discretion of the court the application for extension must be refused.

ADJOURNED summons.

The applicants, Von Kantzow, a Swedish subject, the inventor, and Aktieboleget Kanthal, a Swedish company, the patentees of an invention relating to fire resistant alloys for use in electrical heating elements, applied by originating summons, under s. 18, sub-s. 6, of the Patents & Designs Acts, 1907-1942 (1), for an extension of the term of the patent, on the

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(1) By Patents and Designs Acts, 1907–1942, s. 18: "(1.) A patentee "may, after advertising in manner "provided by rules of the Supreme "Court his intention to do so, "present a petition to the court

SIMONDS J.

1944

VON KANTZOW'S PATENT, *In re.*

ground that they had suffered loss in British sales owing to the outbreak and continuance of the war. The patented alloy was the raw material for the manufacture of various articles in Britain. The exploitation of the invention was begun in 1931 by the Swedish company. It was decided that the alloy could not be economically manufactured in the United Kingdom, but that the invention could best be exploited by concentrating its manufacture for the world market in Sweden and developing its sale in other countries by means of exclusive selling agreements. On May 1, 1932, therefore, the Swedish company made with Hall & Pickles, Ld., of Manchester, an agreement the effect of which was that the English company were constituted sole selling agents in the United Kingdom for the Swedish company and so remained until the expiry of the patent. The evidence satisfied his Lordship that the sale of the patented article was substantially interfered with by the outbreak and continuance of the war, and the case for some extension of the patent could be clearly made out but for certain factors, namely, that the patented material was wholly manufactured abroad, that the Swedish patent had expired, and that the patentees, though they admitted that they had made profits on their foreign sales, were unable to furnish the court with any particulars of those profits on the ground that they were prohibited by Swedish law from doing so.

J. Mould for the applicants. The applicants have proved that they have suffered loss of profit in British sales due to the war, and, if profits have been made in foreign countries, those are not due to the war. The applicants cannot furnish any figures as to such profits because they are not allowed to do so by Swedish law and that fact should not be allowed to prejudice them. The fact that the patented material is manufactured abroad should not prevent the applicants from

"praying that his patent may be "extended for a further term ". . . ."

"(6.) Where, by reason of "hostilities between His Majesty "and any foreign state, the "patentee as such has suffered "loss or damage (including loss "of opportunity of dealing in "or developing his invention "owing to his having been "engaged in work of national "importance connected with such "hostilities) an application under "this section may be made by "originating summons instead of "by petition, and the court in "considering its decision may "have regard solely to the loss or "damage so suffered by the "patentee."

obtaining an extension as there is no demand for a licence for manufacture in Britain.

Lloyd-Jacob for the Board of Trade. The patent has expired in Sweden, as well as in England, and, therefore, ought not now to be extended: *In re Société Chimique des Usines du Rhone's Patent* (1); *In re Kettering & Chryst's Patent* (2). In the latter case the patent was extended, but only for so long as to be coterminous with the foreign patent. Having regard to all the facts, and particularly to the inability of the applicants to furnish the information required by the court as to profits made abroad, this is not a case where the application should be granted. [The following cases were also referred to:—[*In re Wingquist's Patent* (3); *In re Kay & Foxwell's Patent* (4).]

Cur. adv. vult.

April 26. LORD SIMONDS read a judgment in which, after stating the facts, he continued: In the first place, the court requires to be satisfied that the patentee who "as such"—that is, in respect of his British patent—has suffered loss by reason of the war, has not, by reason of the same fact, made a countervailing profit in respect of a foreign patent or otherwise. This is one of the circumstances which the court must take into consideration, for it might well come to pass that the same war which brought loss to a patentee in respect of his British patent might bring to him greater profits in respect of a foreign patent, and I need say no more than that in such an event it is unlikely that the sub-section could be successfully invoked in his favour. In the present case the Swedish company admits having made increased profits since the war, but alleges that such increases have not been due to the war. It is unable to put before this court any relevant particulars, stating that it is by Swedish law prohibited from doing so, and it relies on the fact that it has, after some conflict of opinion among the Swedish authorities, been held not to be liable to the special assessments for so called "conjuncture "taxes" which are imposed on profits that are consequential on the war. This is very unsatisfactory. I do not know what considerations influenced the minds of the Swedish authorities who came to this conclusion, and I hope I shall not be thought

(1) (1921) 39 R. P. C. 27.
(2) (1924) 42 R. P. C. 507.
(3) (1923) 40 R. P. C. 261.
(4) (1924) 42 R. P. C. 222.

to show any lack of comity towards them if I say that there is no presumption that, having all the relevant facts before me, I should conclude that the company's increased profits were not directly or indirectly due to the war. It appears to me that this court, having placed on it the delicate task of determining whether its discretionary jurisdiction should be exercised in favour of an applicant in a matter in which the public interest also is concerned, must be told all the relevant facts. If an applicant is the subject of a foreign State and is precluded by his municipal law from giving the necessary information to the court, that is his misfortune.

In the second place, I must refer again to the fact that the exploitation of the patent in this country has taken the form of the importation of the manufactured material through exclusive selling agents. With this fact must be taken the further fact that in Sweden where the material has been manufactured the corresponding letters patent have expired. The first fact is by itself not necessarily fatal where the application is under sub-s. 6 : see per Sargant J. *In re Société Chimique Des Usines Du Rhone's Patent* (1). That learned judge said that under the ordinary jurisdiction his inclination would be strong against granting any such extension whatever the circumstances of the case where the patented article had been manufactured exclusively abroad. He said, however, that an application under sub-s. 6 was not for an ordinary extension, but for an extraordinary extension by way of quasi-substitution, and that the general reasons which applied against an ordinary extension did not apply to anything like the same extent in the case of an extension under the subsection which really amounted only to a substitution. He, therefore, extended the patent for a period of four years to represent the loss for an equivalent period during the war. In *In re Kettering and Chryst's Patent* (2), which came before Tomlin J. three years later, the evidence showed that the patentee as such had by reason of the war suffered a loss which amounted to about three years of the patent. The patented articles had been manufactured wholly in the United States of America and the American patents expired about one year after the British patents. Tomlin J., whose attention was called to the earlier case, having these facts before him. granted an extension, not for the full period of three years of loss, but for a period of about one year so that the British patents might

(1) 39 R. P. C. 27, 32.

(2) 42 R. P. C. 507.

expire co-terminously with the United States of America patents. His judgment was very short, but it is, I think, clear that, though he was prepared to follow Sargant J. so far as to grant some extension notwithstanding that the patents had been wholly manufactured abroad, he was not prepared to do so in such a way as possibly to place British industry at a disadvantage in comparison with the country where the invention had originated and been manufactured. On a petition for extension the expiry of foreign patents is always a matter to be taken into consideration: see *In re Semet and Solvay's Patent* (1). It may be a "great obstacle" to extension: see *In re Carl Pieper's Patent* (2).

In my judgment, this is the case also where the application is for an extension under sub-s. 6, though it may be a matter of less serious consideration, for, in the creation of any monopoly, the balance must be preserved between the public interest on the one hand and provision of proper reward for the inventor on the other. Where the application is under sub-s. 6 the extended term may be referred to as a substitutional term, but it may have quite a different effect on the public interest if the original term would, but the new term would not, be co-terminous with the foreign patents. This may, particularly, be the case where the patent has been developed and manufactured abroad and has in this country been exploited only by a selling agency. It would, certainly, seem that in regard to the expiry of foreign patents a more indulgent attitude to extension has been adopted by my predecessors where the application is by originating summons under sub-s. 6, just as exclusive manufacture abroad is less seriously regarded for the same purpose. I do not in any way depart from this attitude, but both facts are elements which cannot be altogether disregarded. Giving some weight to them, but giving much greater weight to the fact to which I first referred, namely, that, although through no fault of their own, the applicants are unable to give the court information which I regard as essential, I think it right to exercise my discretion in this case by refusing the application for an extension. The costs of the Comptroller will be paid by the applicants.

Solicitors: *Coote & Co.; Solicitor, Board of Trade.*

(1) (1894) 12 R. P. C. 10.
(2) (1895) 12 R. P. C. 292.

H. L. L.

In re WOOD, SKINNER & COMPANY, LIMITED.

COHEN J.

1944

May 9.

Company—Winding-up—Preference Dividends in arrears—Distribution of Assets after payment of debts and repayment of preference capital—Rights of ordinary and preference shareholders.

A company, incorporated with a capital of 140,000*l.* of which 20,000*l.* was held in 2,000 preference shares of 10*l.* each and the balance in 1*l.* ordinary shares, passed a resolution for voluntary winding-up. By the memorandum the preference shares conferred a right to a fixed cumulative dividend of six per cent. per annum on the capital paid up on them, and they were to rank, both as regards dividends and capital, in priority to the ordinary shares. At the date of the winding-up resolution the preference dividend was considerably in arrear :—

Held, that, after payment of or provisions for the debts and liabilities of the company and the repayment of the preference capital, the preference shares were not entitled to any further priority over the ordinary shares for payment of arrears of dividend. *In re Walter Symons, Ld.* [1934] Ch. 308 distinguished.

SUMMONS in winding-up.

The company, Wood, Skinner & Co., Ld., was incorporated in 1897 to carry on the business of shipbuilders. At the date of the liquidation the issued capital consisted of 2,000 preference shares of 10*l.* each, and 120,000 ordinary shares of 1*l.* each. Clause 5 of the memorandum of association, after providing for the division of the capital of the company into preference and ordinary shares, continued : " Such preference shares " shall confer the right to a fixed cumulative dividend of " 6*l.* per cent. per annum on the capital paid up thereon and " shall rank both as regards dividends and capital in priority " to the ordinary shares with power to increase the capital. " And any new capital may be issued with any preferential, " deferred or special rights and privileges which may be " assigned thereto by or in accordance with the regulations " of the company for the time being." On April 4, 1939, the company passed a resolution for voluntary liquidation. At the date of the last balance sheet before the liquidation, February 28, 1939, there were no profits available for dividends, no reserves, and a debit to profit and loss account of 100,000*l.* The dividends on the preference shares were in arrear to the extent of 14,000*l.* As the result of the liquidation, the amount available for distribution after payment of a provision for debts, liabilities and costs was about 39,000*l.* apart from land worth about 3,000*l.* Out of this the repayment of the preference capital absorbed 20,000*l*. This summons was taken out by the liquidator to determine whether the preference shares ranked for arrears of dividend in priority to any repayment of the ordinary capital.

C. W. Turner for the liquidator.

Jopling for a defendant representing ordinary shareholders. The preference shares are to rank before the ordinary shares "both as regards dividends and capital." Apart from authority, "dividend" means a payment of a share of profits while the company is a going concern. It is not unnatural that in cl. 5 of the memorandum the priority of the preference shares as regards dividends should be repeated twice over, but that does not alter the meaning of "dividends" as being payable out of profits only. No part of the money available for payment of arrears represents undistributed profits. The case is distinguishable from, but is supported by the reasoning in, *In re Walter Symons, Ld.* (1) where the judgment turned largely on the meaning of the words "rank" and "capital" and the provision limiting the rights of the preference shareholders. Here preference shares would rank equally with ordinary shares in the distribution of surplus assets if there were any: *In re William Metcalfe & Sons, Ld.* (2). "Priority of dividend" must be given its ordinary meaning, and that meaning does not extend to arrears: *In re W. J. Hall & Co., Ld.* (3).

R. J. T. Gibson for a defendant representing preference shareholders. The present case is governed by the decision *In re Walter Symons, Ld.* (1). The clause in the memorandum is practically the same in both cases. It is immaterial whether there are any profits to be distributed or not. The word "dividends" in cl. 5 of the memorandum includes any arrears of cumulative preference dividend.

COHEN J. [after stating the facts]. So far as winding-up is concerned, the only thing to be observed is that nothing is said in the memorandum about the distribution of surplus assets in a winding-up. The rights of the shareholders in this respect are left to be inferred from the memorandum and articles, and accordingly, subject to the construction which I may place on cl. 5 of the memorandum, after capital has been repaid, the preference and ordinary shares will rank pari passu in the winding-up. This class of question is always of considerable difficulty. As was said by Romer L.J. in *In re William Metcalfe & Sons, Ld.* (1): " In construing the memorandum " and articles we must not approach the question with any " obsession or preconceived idea as to the inherent equality " between shareholders in a company; but when with an " open mind we have construed the memorandum and " articles, then I agree entirely with the statement made by " Astbury J. in giving his judgment in *In re Fraser & Chalmers,* " *Ld.* (2) that ' all shareholders are entitled to equal treatment " ' unless and to the extent that their rights in this respect " ' are modified by the contract under which they hold their " ' shares '." The question is whether, on the true construction of the memorandum and articles, the preference shareholders are entitled to their arrears of dividend so that the rights of the ordinary shareholders are, to that extent, postponed. Mr. Gibson, in his argument on behalf of the preference shareholders, submitted to me that this case was covered by the decision in *In re Walter Symons, Ld.* (3). It is true that the wording of the memorandum of association in that case was nearer to that in the present case than was the wording in any of the other cases to which my attention was directed. By cl. 5 of the memorandum of association in that case the preference shares conferred " the " right to a fixed cumulative preference dividend at the " rate of 12 per cent. per annum on the capital for the time " being paid up thereon . . . . and shall rank, both as regards " dividends and capital, in priority to the ordinary shares." Then come these words which may be important and are not to be found in cl. 5 of the memorandum in the present case: " but shall not confer the right to any further participation in profits or assets." Maugham J. said: " The point that " comes before me for decision is in my opinion by no " means free from doubt. Perhaps I may observe that it is " only after some experience that one appreciates the infinite " number of combinations and permutations that company " draftsmen are capable of using in what are called their " ' capital clauses ' in the drafting of company memoranda and " articles." After stating the relevant provisions of the memorandum and articles, which, so far as the articles are concerned, are, I think, not distinguishable from the articles in this case, he says: "I think it is conceded, at any rate "I think it is clear, that, but for the words 'and shall rank "'both as regards dividends and capital in priority to the "'ordinary shares,' the preference shareholders would not be "entitled to claim in a winding-up payment of the arrears of "fixed cumulative preferential dividend at the rate of "12 per cent. The question, therefore, is reduced to this: "What is the true meaning of the words that I have last "cited? To my mind, it is reasonably clear on construction "that they refer to something which is to take place in the "winding-up. Not only does that appear from the word "'rank,' but it also appears from the reference to capital, "which of course would not be distributable if the company "were a going concern; and, finally, the words 'but shall "'not confer the right to any further participation in profits "'or assets' seem to me to point very strongly in favour of "the view that it is a clause which in this case is dealing with "what is to happen in the winding-up. So reading it, I have "the earlier part of the clause, which confers a cumulative "preferential dividend at a fixed rate on the capital paid up "on the preference shares and a right to half the distributable "surplus profits of each year after paying 10 per cent. per "annum for a particular year on the capital paid up on the "ordinary shares. Then I read the subsequent clause"—that is the reference to ranking as regards dividend and capital—"in effect, as if it said: 'And in the winding-up the preference "'shares shall rank, both as regards dividends and capital, "'in priority to the ordinary shares'." He then deals with the facts as regards dividends in that case and says that there were profits out of which the dividends could have been paid, but I do not think that that was part of the ratio decidendi of his judgment. He goes on: "Now, how am I to "construe the word 'dividends' in the phrase 'both as "'regards dividends and capital,' regarding that, as I have "said I do, as a phrase meaning 'in the winding-up'? On "the whole, though not without hesitation, I have come to "the conclusion that the words 'dividends' should be "construed as meaning 'arrears of fixed cumulative prefer-"'ential dividend.' This clause is dealing, at any rate in "this place, with the rights of preference shareholders who "are stated to be entitled as of right to a fixed cumulative "preferential dividend. It is true that the directors had

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(1) [1934] Ch. 308.
(2) [1933] Ch. 142.
(3) [1909] 1 Ch. 521.

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(1) [1933] Ch. 142, 159.

(2) [1919] 2 Ch. 114.

(3) [1934] Ch. 308, 311.

"a power to withhold payment of that dividend, but without "depriving the preference shareholders of their right at "some future time to be paid. That is derived from the use "of the word 'cumulative' and I think the draftsman, when "he penned this part of cl. 5, was regarding a right to that "dividend as existing notwithstanding the winding-up, and "he is here stating that both as regards the arrears of fixed "cumulative preferential dividend and as regards capital the "preference shareholder is entitled to priority over the "ordinary shares and I so decide."

I think that Mr. Jopling, for the ordinary shareholders, was right in saying that Lord Maugham's judgment was based on three factors: first, the use of the word "rank"; secondly, the reference to "capital"; and, thirdly, the provision that there was not conferred on the preference shareholders the right to any further participation in profits or assets. I respectfully agree with the conclusion which Lord Maugham reached and I think that the last of the three elements to which I have referred is really almost conclusive on the point. I do not, however, think that I can place the same construction on the words in this case. I have no doubt in my mind, and I think that it is reasonably clear on the authorities to which my attention was called, that the preference shareholders, had there been any surplus after repaying capital on both preference and ordinary shares, would have been entitled to participate pari passu with the ordinary shareholders in the distribution of the surplus assets. I do not think that the word "rank", used in this connexion, is confined to winding-up. I think that it is intended to cover winding-up so far as capital is concerned, but that so far as dividends are concerned it refers to dividends in the strict sense of the word, i.e. while the company is a going concern. In my view, in the context of this case, the word "dividends" is not exchangeable with arrears of dividend. I have, therefore, come to the conclusion, though not without hesitation, that Mr. Jopling's argument was right and that the answer to the question submitted is in the negative.

Solicitors: *Hair & Co., for Steel, Maitland & Byers, Sunderland; Gregory, Rowcliffe & Co., for Cooper Jackson, Newcastle-on-Tyne.*

H. L. L.

Distinguished. In re GREENWOOD'S AGREEMENT [1950] 1 Ch. 33

Distinguished and Criticised. Re GREENWOOD'S AGREEMENT. [1950] 1 All E.R. 436.

Questioned. PARKUS *v.* GREENWOOD [1950] Ch. 644

GREEN *v.* PALMER.

UTHWATT J.

1944

May 16

Landlord and tenant—Letting for six months with option to tenant to continue tenancy " on same terms and conditions including option " clause "—Effect of option clause.

By an agreement in writing the owner of a furnished house let it to a tenant at a weekly rent for six months certain with an option to the tenant to continue the tenancy at the expiration of the term on the same terms and conditions " including this clause " on giving notice in writing. The tenant twice renewed the tenancy and then held over, claiming a right of perpetual renewal:—

Held, that, under the agreement the tenant was entitled on exercising the option contained in the original tenancy agreement to a tenancy for six months with a right to renew for one further period of six months and no more.

ACTION.

By a tenancy agreement, made on July 1, 1940, the landlord, Green, agreed to let and the tenant, Palmer, agreed to take a house at Llandudno, together with the furniture and fixtures described in the schedule, at a weekly rent of 3*l.* 3*s.*, for a term of six months from July 9, 1940, to January 9, 1941. The agreement contained the usual common form covenants, including one by the tenant to make good, restore and repair any furniture damaged or destroyed during the term, and also the following clause: " The tenant is hereby granted the " option of continuing the tenancy for a further period of " six months on the same terms and conditions including this " clause, provided the tenant gives to the landlord in writing " four weeks' notice of his intention to exercise his option." The agreement included the usual provision for re-entry on breach of covenant. The landlord agreed to pay all rates and taxes, and to keep the house in repair, and it was also agreed that " if the tenant takes the house on a subsequent " occasion, or introduces another tenant, the letting shall be " done through the agency of Blake & Williams," to whom the tenant was to pay the rent. The tenant exercised the option of renewal at the end of the first, and again at the end of the second, six months. Afterwards he held over and contended that he was entitled to a perpetually renewable tenancy. The landlord contended that the agreement had determined and brought this action to recover possession.

Watmough for the landlord. The option to renew contains one further option of renewal, but no more, but the tenant contends that the effect of the clause gives him a perpetual right of renewal. If it did, it would be converted by the Law of Property Act, 1922, sch. 15, para. 5, into a term of 2,000 years. It has often been said that the court leans against the construction of a lease as being perpetually renewable: *Swinburne* v. *Milburn* (1). Properly construed, the agreement means that at the end of six months the landlord will, if requested, grant a renewal for another six months with a further option to renew for still another six months. That makes a letting for a total of eighteen months, but no more. [*Gray* v. *Spyer* (2), and *Hare* v. *Burges* (3), were cited.]

J. F. Bowyer for the tenant. This agreement gives the tenant a perpetual right of renewal. The words "including "this clause" must be inserted in the option contained in the second, third and all subsequent leases, so that it is continued indefinitely: *Wynn* v. *Conway Corporation* (4), where very similar words were held to give the lessee a perpetual right of renewal.

UTHWATT J. The question I have to decide is the proper construction of the clause giving the tenant an option of continuing the tenancy. That matter depends on the actual words which have been used, read in the light of the surrounding circumstances. The first fact is that this is a letting of a house, including the furniture, under which the landlord agreed to bear the burden of rates and taxes. Second, the rent was to be paid to Blake & Williams, named estate agents, who might or might not continue to function during the continuance of the tenancy if, on its true construction, it does contain an obligation to renew in perpetuity at the tenant's option.

Those are the actual circumstances. How, then, should the clause be read? There are statements to be found in the cases suggesting that the courts rather lean against construing a covenant as containing a perpetual right of renewal. I think that the proper rule is stated by Lord Selborne in *Swinburne* v. *Milburn* (5), where he says: "I am not inclined to adopt the "language which is to be found in some authorities, to the "effect that there is a sort of legal presumption against a right "of perpetual renewal in cases of this kind; but those

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(1) (1884) 9 App. Cas. 844.

(2) [1922] 2 Ch. 22.

(3) (1857) 4 K. & J. 45, 57.

(4) [1914] 2 Ch. 705, 708.

(5) 9 App. Cas. 844, 850.

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"authorities certainly do impose upon anyone claiming such "a right the burden of strict proof, and are strongly against "inferring it from any equivocal expressions which may "fairly be capable of being otherwise interpreted." I accept this, subject to the observation that it is not a question of proof, but of reading the document in the light of the actual circumstances, equivocal expressions not being construed as conferring a perpetual right of renewal.

Turning to the language of the clause, the first thing one observes is that there is granted to the tenant in terms a single option exercisable only once on the named event. The option is "of continuing the tenancy for a further period of six "months on the same terms and conditions including this "clause." That is the only continuation provided for. To my mind, what that means is that the tenant is to be allowed once, and once only, the opportunity of continuing the tenancy for a further six months whatever the terms of that continuation. Then we come to the critical words "and on the "same terms and conditions including this clause." As I read it, that means that there is to be included in the new tenancy agreement a right in the tenant, if he thinks fit, to go on for one further six months, but when you have got to that stage you have finished with the matter. In other words, it comes to this: "Here is your present lease. You may "continue that, and if you continue it, you continue it on "the terms that you have a right of renewal for a further "six months." On that footing, in the events which have happened, all the landlord was bound to do under this arrangement was to permit the tenant to occupy for a period not exceeding eighteen months on the whole from the time when the original lease was granted.

Solicitors: *Newton G. Driver & Co., for Bone & Payne, Llandudno* ; *Bell, Brodrick & Gray, for Henderson & Hallmark, Llandudno.*

H. L. L.

In re SEBAG-MONTEFIORE.

SEBAG-MONTEFIORE *v.* ALLIANCE ASSURANCE COMPANY, LIMITED.

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1944

April 19, 20; *May* 15.

Lord Greene M.R., MacKinnon and Luxmoore L.JJ.

Will—Payment of stated amount free of income tax—Annuity—Will made before September 3, 1939*—Codicil confirming will made after that date—Variation of provision—Increase of annuity by codicil—Finance Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1.

Where by her will made before September 3, 1939, a testatrix bequeaths annuities free of income tax and by her codicil made after that date she expressly confirms the will, the bequests of the annuities continue to be made before September 3, 1939, so that s. 25, sub-s. 1, of the Finance Act, 1941, applies to reduce the amount of each annuity payable free of income tax, while income tax remains at 10*s*. in the £, to twenty twenty-ninths thereof. *In re Tredgold* [1943] Ch. 69 overruled.

Where, too, an annuity bequeathed by the will free of income tax is increased in amount by the codicil, it is only to the extent of the increased amount that the bequest being made by the codicil is not within s. 25, sub-s. 1, of the Act. The mere increase in the amount of the annuity is not a "variation" of the bequest in the will within s. 25, sub-s. 1 (*c*).

Appeal from Simonds J.

By her will, dated August 28, 1937, Ida Marie Sebag-Montefiore, after appointing the Alliance Assurance Co., Ld., to be her executors and that company and her son, John A. Sebag-Montefiore, to be the trustees of her will and making certain specific and pecuniary bequests, bequeathed the following annuities free of all duty and income tax but not sur-tax:—to Edith Bryan during her life an annuity of 100*l.*; to Kate Gibson during her life an annuity of 150*l.*; to E. M. Haynes during her life an annuity of 300*l.*; to her parlour-maid, Rose Milgate, if in her service at the time of her death and not under notice to quit, or if, after leaving her service, in receipt of a pension or allowance, an annuity of 100*l.*; to Ernest Jacobs an annuity of 200*l.* so long as he and his present wife, Alice, and his daughter, Nellie, were all living and an annuity of 150*l.* so long as he and either his said wife or said daughter were living; to Alice Jacobs an annuity of 150*l.* so long as she and her said daughter, Nellie, were both living and to the last survivor of Ernest Jacobs, Alice Jacobs and Nellie Jacobs an annuity of 150*l.* during the remainder of his or her life. The testatrix also gave the trustees power to continue

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the payment of any pension, annuity or allowance she was paying at her death to any person to whom no annuity was specifically given and she gave her trustees power to set aside a fund to answer any annuity. By a codicil, dated September 25, 1939, the testatrix, in addition to making certain other gifts, directed that the annuity of 300*l.* bequeathed to E. M. Haynes by her will should "be increased to 400*l.*" and she concluded with the words: "In all other respects "I confirm my said will." The testatrix died on April 21, 1940, and all the annuitants except Alice Jacobs survived her. On January 4, 1944, a summons was taken out to have it determined whether, or not, in view of s. 25, sub-s. 1, of the Finance Act, 1941 (1), the annuities were payable in full free of income tax. Simonds J., following his previous decision in *In re Tredgold* (2), held that s. 25, sub-s. 1, of the Act of 1941 did not apply to the annuities, and, therefore, that the full amounts were payable free of income tax. The plaintiffs appealed.

Lindner for the plaintiffs. *In re Tredgold* (2) was wrongly decided and Simonds J. ought not to have followed it. It is the principle of *In re Waring* (3) which ought to be followed. It was then decided that the existence of a deed, dated after September 3, 1939, which merely confirmed a deed entered into before that date and containing a covenant to pay an annuity free of tax, did not make the Finance Act, 1941, s. 25, sub-s. 1, inapplicable. If that was true of a confirmation by deed, it is equally true of a confirmation by codicil. In *In re Tredgold* (2) Simonds J. said that the disposition in the will must be treated as contained in the codicil and relied on *Anderson* v. *Anderson* (4) and *In re Blackburn* (5), but these cases merely show that an invalid bequest in a will may be validated by its confirmation in a codicil, in which event, of

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(1) By Finance Act, 1941, s. 25, sub-s. 1: "Any provision, however worded, for the payment, "whether periodically or otherwise, of a stated amount free of "income tax . . . . being a provision which—(*a*) is contained ". . . . in any will or codicil ". . . . and (*b*) was made before "September 3, 1939; and (*c*) has "not been varied on or after that "date, shall, as respects payments "falling to be made during any "year of assessment, the standard "rate of income tax for which is "10*s.* in the £, have effect as if for "the stated amount there were "substituted an amount equal to "twenty twenty-ninths thereof."

(2) [1943] Ch. 69.

(3) [1942] Ch. 426.

(4) (1872) L. R. 13 Eq. 381.

(5) (1889) 43 Ch. D. 75.

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course, the bequest becomes a bequest made by the codicil. There is no ground for treating a valid bequest in a will as made in a codicil merely because the codicil confirms the will. There is here no question of the codicil varying the dispositions in the will, apart, possibly, from the increased annuity given to Miss Haynes, and the date of a disposition is not altered by confirming it. In *In re Tredgold* (1) Simonds J. distinguished *In re Elcom* (2) on the ground that the codicil there had no confirmatory clause, but Chitty J. said (3) that that made no difference, and Lindley L.J. (4) took the same view. A codicil is a supplement or addition to the will: *Green* v. *Tribe* (5). In *Rolfe* v. *Perry* (6) a will made before the commencement of Locke King's Act (17 & 18 Vict. c. 113) was held to be " already made " within the Act. [He was stopped.]

J. A. Reid for the annuitants. First, as to the annuity increased in amount by the codicil. That was a variation of the bequest made by the will by substituting 400*l.* for 300*l.* as the amount of the annuity. That is a clear variation after September 3, 1939, within s. 25, sub-s. 1, of the Finance Act, 1941. The testatrix knowing that there will be increased income tax owing to the war increases the amount of the annuity given free of tax. As to the main question, Simonds J. has found that the express confirmation of the will has the same effect as if the bequests of the annuities free of income tax were written in the codicil. That is confirmed by *Anderson* v. *Anderson* (7) and *In re Blackburn* (8). By expressly confirming the provisions in a will the testatrix is in effect revoking them as part of his will and inserting them in the codicil. All the arguments in favour of the annuitants have been fully stated by Simonds J. in *In re Tredgold* (1), and it is on that judgment that they rely.

Pennyquick for the trustees.

Lindner in reply. It is admitted that, the extra 100*l.* annuity to Miss Haynes being given by the codicil, and, therefore, after September 3, 1939, to that extent s. 25, sub-s. 1, of the Act of 1941 does not apply. The mere increase in the amount of the annuity is not, however, a variation of the bequest in the will. It stands and a further gift is added by the codicil. It is the provision for the " payment . . . .

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(1) [1943] Ch. 69.

(2) [1894] 1 Ch. 303.

(3) Ibid. 307.

(4) Ibid. 312.

(5) (1878) 9 Ch. D. 231.

(6) (1863) 3 De G. J. and S. 481.

(7) L. R. 13 Eq. 381.

(8) 43 Ch. D. 75.

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" of a stated amount free of income tax " that has to be varied so as to take it out of s. 25, sub-s. 1, and that has not happened here.

Cur. adv. vult.

May 15. The following judgments were read.

LORD GREENE M.R. This is an appeal from a judgment of Simonds J., as he then was, raising, so far as the main point is concerned, the same question as that which had already been decided by the same learned judge in *In re Tredgold* (1). Simonds J. followed his own decision without giving any further reasons, and the appeal is, accordingly, in substance an appeal from that decision.

The question for decision relates to the effect of s. 25, sub-s. 1, of the Finance Act, 1941, on the bequest of annuities free of income tax contained in the will of the testatrix, dated August 28, 1937. That Act received the royal assent on July 22, 1941, fifteen months after the death of the testatrix, and if the codicil, which is dated September 25, 1939, had not in terms confirmed the will the provisions of the sub-section would unquestionably have applied under the decision of this court in *In re Waring* (2), but in that case the question was left open whether the position would be different where a codicil, made after September 3, 1939, contained an express confirmation of a will made before that date. That question Simonds J. answered in the affirmative in *In re Tredgold* (1) holding that the disposition for the payment of the tax free annuity in that case, although originally made in a will made in 1936, must for the purposes of the sub-section be treated as having been made by a codicil made in 1941 by reason of the fact that the codicil contained a confirmation of the will. The main question which we have to decide is whether or not this view is correct. There is a subsidiary question in the case of the annuitant, Miss Haynes, whose annuity was increased by the codicil from 300*l.* to 400*l.*, namely, whether the provision as to the 300*l.* contained in the will was " varied " by the codicil within the meaning of that expression in para. (*c*) of sub-s. 1. It is not disputed that the provision as to the additional 100*l.* was made by the codicil so that the sub-section does not apply to it.

The effect of the sub-section is to give to provisions for payment of sums free of tax a statutory effect different from that which they would otherwise have had. In order that such a provision may receive this statutory effect it must comply with certain requirements, namely, (*a*) it must be contained in a document of one of the specified types, one of which is a will, another of which is a codicil, (*b*) it must have been " made " before September 3, 1939, (*c*) it must not have been " varied " on or after that date. The question, as it appears to me, is primarily one of the construction of the sub-section. It is, of course, necessary also to construe the will and codicil for the purpose of seeing whether or not the statutory conditions are complied with, but, before approaching the will and codicil, we must first know what it is we have to look for in them, and the answer to that question depends on the true interpretation of the words of the statute. The first thing to be looked for is a document, which in the case of a testamentary provision may be either a will or a codicil, containing a provision for payment of a tax free sum. Having found such a document we must then look for the date when the provision which it contains was made, which in the case of a provision contained in a will or codicil will be the date when the will or codicil (as the case may be) was completed by execution and attestation: *In re Waring* (1). If the provision thus identified was made before September 3, 1939, that is, if the will or codicil containing it was completed before that date, we must look to see whether or not it has been " varied " on or after that date. If it has not been so " varied " the sub-section applies to it.

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(1) [1943] Ch. 69.

(2) [1942] Ch. 426.

This being the nature of the inquiry which the sub-section directs us to make we can now turn to the will and codicil. The first question of construction which arises in relation to them appears to me to be simply this : Does either and which of those two documents on its true interpretation contain a provision for payment of a tax free sum ? The answer to this question, in my opinion, clearly is that the will is a document containing such a provision. As to this there can be no controversy. This provision (subject to the question in the case of Miss Haynes) has not been varied on or after September 3, 1939. Prima facie, therefore, the sub-section applies, but for the purposes of applying the sub-section it is necessary to look at the codicil to see whether on its true construction it has the effect of taking the provision out of the document by which it was originally made and inserting

(1) [1942] Ch. 426.

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it in the codicil. Now all that the codicil, as construed for this purpose, purports to do is to confirm the provision contained in the will. In the case of a provision contained in a document inter vivos, for example, a separation deed, it has been held by this court that a mere confirmation of the provision has no effect. What is required to exclude the operation of the sub-section is a " variation ": *Dudley* v. *Dudley* (1). I can see no ground for distinguishing the case of a confirmation by codicil of a provision contained in a will and a confirmation such as was made in *Dudley* v. *Dudley* (1) of a provision contained in a deed. Once it appears that all that the later document does is to confirm the earlier document in which the provision is contained, it seems to me to follow of necessity that the section applies. The section is concerned with provisions, made in documents, which have not been varied on or after September 3, 1939. Of course, there may be cases where the provision is, for the purposes of the section, " made " by the codicil and not by the will. For example, if a testator, having bequeathed tax free annuities by a clause in his will, revokes that clause by a codicil and substitutes a list of annuitants containing the name of one of the original annuitants as legatee for an annuity similar in all respects to that originally given, the provision of that annuity would obviously, for the purposes of the sub-section, be made in the codicil and not in the will. Another example would be where a testator by his will gave to a legatee a tax free annuity of such an amount as he might by codicil prescribe and subsequently by a codicil prescribed the amount. Here for the purposes of the sub-section the provision would clearly be made by the codicil since, before the making of the codicil, there was no complete provision, but where the will contains a complete provision and all that the codicil does is to confirm it, I cannot so construe the sub-section as to say that the provision is " made " by the codicil. Simonds J., in his judgment in *In re Tredgold* (2), approached the matter from a different angle. He construed the confirmation clause in the codicil as being in effect a repetition of the words of the will, the result in his view being that the provision of the annuity is contained in the codicil. Speaking of the testator he says: " The fact that he makes a codicil shows that he is reviewing " his testamentary dispositions and, reviewing them, he in " effect says ' This and this I want to alter. This and this

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(1) [1944] 1 K. B. 264.

(2) [1943] Ch. 69, 78.

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" 'I want to stand.' He is there and then stating by reference " to an existing and identifiable document his last and final " wishes. He is in fact, making his last will." With great respect to Simonds J., this method of dealing with the matter does not appear to me to take into account what is, to my mind, the fundamental question, namely, the true construction of the sub-section. There can be no doubt that for certain purposes the effect of a confirmation contained in a codicil is important. Examples are to be found in the two cases on which Simonds J. principally relied. In *Anderson* v. *Anderson* (1) the testatrix, having made an invalid bequest to the husband of one of the attesting witnesses, confirmed her will by a codicil which was not attested by the wife. It was said that " the whole contents of the previously existing will " were incorporated in the codicil." This was merely a case where the testatrix, by confirming the document which she described as her will, a document which was in the material respect incapable of taking effect, declared by a perfectly valid codicil that the contents of that document embodied her testamentary dispositions. It seems to me that the decision does not give any assistance in deciding the present question, which is of a quite different character. The same observation applies to *In re Blackburn* (2) where a testator by will made during the lifetime of his wife used words sufficient in themselves to exercise a power of appointment, but the power which he, in fact, had was only exercisable after the death of his wife who was living at the date of the will. By his codicil, made after her death, he confirmed the will. This, again, was merely a case of incorporating by reference an invalid disposition contained in an earlier document identified in the codicil, and quite obviously the codicil operated as a valid exercise of the power. In each of these cases the disposition contained in the will was incapable of taking effect, and it was only by virtue of the incorporation of the contents of the will in the codicil that the disposition became a valid one.

The only other authority to which I need refer is *In re Elcom* (3). That was a case under Malins' Act and the question was : When was the instrument made under which the assignor acquired her title to the property ? The disposition was contained in a will made before the statutory date, but the testatrix who made it made a codicil after that date. The

(1) L. R. 13 Eq. 381.

(2) 43 Ch. D. 75.

(3) [1894] 1 Ch. 303.

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codicil did not contain an express confirmatory clause. Chitty J. said that nothing turned on the absence of such a clause. In this court Lindley L.J. said that it was immaterial that the testatrix "did not in terms republish her will." In spite of the doubts expressed by Simonds J. as to the meaning of these expressions I am of opinion that both of them refer to a confirmatory clause and not to the general doctrine of republication. They are, no doubt, dicta, but they are, in my opinion, correct and accord, as does the whole reasoning of the judgments in that case, with my own view as to the right approach to the present problem.

I now turn to the case of Miss Haynes. The point is a short one: Was the provision as to her 300*l.* tax free annuity contained in the will "varied" by the codicil within the meaning of that expression in the sub-section? I do not think that it was. The "variation" referred to in the sub-section must, I think, be a variation of the provisions contained in the original disposition for payment free of income tax. A mere variation in the amount of the tax free sum does not appear to me to be sufficient and I can see no reason why the legislature should have said that it was. If mere increase of the amount is a variation, mere decrease also must be a variation. It must be borne in mind that the section is designed to cover the cases of testators who had completed their testamentary dispositions and in many cases had died before the Act became law and at a time when no testator could have had in mind the possibility of such an Act being passed. The legislature has not thought fit to exclude the operation of the section in cases where the disposition has been confirmed since September 3, 1939. A provision that a mere variation of the amount is to exclude the operation of the section appears to me to be capricious and unreasonable and no explanation could be suggested by counsel why the legislature should have so intended. The words, in my opinion, are capable of being construed in the way I have suggested, and I agree with the argument that this is their true meaning. There is nothing in the judgment in *Dudley* v. *Dudley* (1) inconsistent with this view. If, however, I am wrong in this I am still of opinion that the disposition as to the original 300*l.* has not been varied. All that the testatrix has done is to add something to the annuity she had already given by the will. The gift of that annuity by the will is in no sense revoked. It still stands and the provision for it is I think "contained" in the will within the meaning of the sub-section. It is only the provision for the additional 100*l*. which is contained in the codicil. In my opinion the appeal should be allowed.

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(1) [1944] 1. K. B. 264.

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MACKINNON L.J.: I might have been content to say merely that I agree with the judgment of the Master of the Rolls, but, as we are differing from the learned judge, perhaps I had better read what I have independently written.

I find myself unable to agree with the decision of Simonds J., as he then was, in *In re Tredgold* (1). The material words in s. 25 of the Finance Act, 1941, are: "A provision . . . . "which is contained in any will or codicil . . . . and was "made before September 3, 1939, and has not been varied "on or after that date shall," etc. There was a provision of the type in question "contained in the will" which the testatrix executed in due form on August 28, 1937, that is, before September 3, 1939. Prima facie this will was "made" on August 28, 1937, as was held in this court in *In re Waring* (2). The word "made" in the section is not a term of art, but has merely its meaning as a simple English word. If in March, 1940, a month before her death, the testatrix was asked: "Have you *made* your will and, if so, when did you *make* it?" I think she would have correctly answered: "Yes, I made my "will on August 28, 1937," and I think she would be with reason astonished if her questioner had said: "No, you "didn't; you *made* your will when you executed a codicil "on September 25, 1939," and as much astonished as the testator in *In re Waring* (2) who, having answered a similar question, was told: "No, when you are dead you will only "have made your will on the day of your death." Simonds J. held that the provision in this will was "made" on September 25, 1939, when the testatrix, having by a codicil varied other provisions in the will executed on August 28, 1937, added the words: "In all other respects I confirm my "said will which is dated August 28, 1937." As to this, I remark (1.) that I think the words in this sentence might truly have been "I confirm my said will which I *made* on "August 28, 1937"; and (2.) if these words had been omitted from the codicil, the will of August 28, 1937, as varied by the codicil would have been as valid and effective as it is now. It is, indeed, strange if by reason of the insertion of a few words

(1) [1943] Ch. 69.

(2) [1942] Ch. 426.

in the codicil that were entirely unnecessary the date of the "making" of the provision in the will of August 28, 1937, has to be treated as postponed to September 25, 1939, when the codicil was signed and witnessed.

A number of cases were cited and discussed by Simonds J. None of them appear to me to be relevant. The only question that concerns us is: "When was the provision which appears "in the document dated August 25, 1937, *made*?" And that question is solely one as to the construction of these few words in this Act of Parliament of 1941. Cases before that Act was ever dreamed of as to the construction of other documents or Acts can be of very little assistance. For myself I find them embarrassing rather than helpful. In my opinion, the provision in the will in question in *In re Tredgold* (1) was clearly "made" on March 23, 1936, and in the present case the provision in the will we are concerned with was "made" on August 28, 1937, that is, in both cases before September 3, 1939.

There remains, however, the separate question as to the annuity given by the will of August 28, 1937, and increased in amount by the codicil of September 25, 1939. Can it be said that the provision in the will has been "varied" by the codicil within the meaning of that word in s. 25 of the Act of 1941? I think not. The language of the section deals with "a provision for the payment of a stated amount free "of income tax," and it is this provision that must be "varied" in order to prevent the section applying. There was here no "variation" of the direction in the will that the annuity should be paid "free of income tax." All that the codicil did was to increase, and, therefore, to "vary" the amount "stated" in the will. Nothing at all is said in the codicil as to the provision in the will that the annuity should be paid "free of "income tax," and, therefore, nothing in the codicil can possibly have "varied" this provision in the will. I agree that the appeal should be allowed.

LUXMOORE L.J.: I agree that this appeal must be allowed on both points. The main question is whether s. 25, sub-s. 1, of the Finance Act, 1941, affects annuities given by the testatrix "free of all duty and income tax thereon but not sur-tax." The second question is whether the section referred to affects one of the annuities, namely, that in favour of Eleanor

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(1) [1943] Ch. 69.

Marjorie Haynes. Originally this was fixed by the will at 300*l.*, but it was subsequently increased by a codicil to the will to 400*l.* Simonds J. held that none of the annuities was affected by the section, and, consequently, that they were payable out of the testatrix's estate free of duty and income tax. In so holding he followed his previous decision in *In re Tredgold* (1), without expressing any additional reasons, so that on the main question this appeal is in substance from that decision. As has been pointed out by the Master of the Rolls, the main question was expressly left open by this court in *In re Waring* (2). In that case it was held that a will executed before September 3, 1939, although republished by a codicil made after that date, but containing no confirmatory clause, fell within the section and was affected by it. The question left open was whether a different result would be reached if the codicil had contained a clause expressly confirming the will.

In my judgment, the answer to the main question is primarily one of construction of the section and only incidentally of the will and codicil. It is to be observed that the first requisite needed to bring the section into operation is that there should be the provision of a stated amount free of income tax. The second requisite is that that provision should be contained in a document of a particular class—in the present case a will or a codicil. The third requisite is that the provision (not, be it observed, the document) should be made before September 3, 1939. The fourth and last requisite is that the provision should not have been varied on or after that date. Consequently, the first thing to seek is a provision. In the present case there is such a provision. It is to be found in the will of the testatrix, while there is no such express provision (apart from the annuity of 400*l.* given to Eleanor Marjorie Haynes) in any codicil to that will. In this connexion it is, I think, well to bear in mind that a will is a different document from a codicil. The distinction between the two is, perhaps, most clearly explained in the definition of a codicil contained in *Termes de la Ley* (1721 ed.), p. 135, the authorship of which is assigned by Sir Edward Coke to William Rastal, Justice of the Common Pleas in the reign of Queen Mary. "A codicil "is an addition or supplement added unto a will or testament "after the finishing of it for the supply of something which "the testator had forgotten or to help some defect in the "will." The distinction between a will and a codicil is also

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(1) [1943] Ch. 69.

(2) [1942] Ch. 426.

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pointed out in a quaint passage in Swinburne on Testaments (1803), 7th ed., vol. 1, p. 29. The passage reads : " Whereupon " the writers conferring a testament and a codicil together " and perceiving the odds betwixt the one and the other, they " call a testament a great will, and a codicil a little will And " do compare the testament to a ship, and the codicil to a boat, " tied most commonly to the ship." The next step is to ascertain when the provision was made. Obviously it was made when the will was executed, namely, on August 28, 1937, that is, before September 3, 1939. The last inquiry is : Has the provision been varied, and, if so, by what document ? The only document by which the provision in the will might have been varied is the codicil of September 25, 1939. Turning to the codicil, apart from the annuity provided for Eleanor Marjorie Haynes, there can be no question of variation because none of the provisions with regard to annuities (except as above mentioned) is referred to, and, so far from the codicil containing any variation, there is an express confirmation of the will. In this connexion, I would refer to the decision of this court in *Dudley* v. *Dudley* (1), which seems to me to be equally applicable to a testamentary document as to a deed. Apart, therefore, from any authority, I should have no hesitation in holding that the section applies to all the annuities other than that in favour of Eleanor Marjorie Haynes which in this respect is the subject of what I have styled the second question.

The only ground on which it is said that the section does not apply to those annuities is that the provision for them, notwithstanding the will was executed before September 3, was not made before September 3, 1939, because the codicil made on September 25, 1939, in effect republished the will, and, consequently, the provision must be treated as made at the later date. In *In re Waring* (2) the codicil made after September 3, 1939, admittedly republished the will although it contained no express confirmation of it. In my judgment, there is no magic in the confirmatory clause. So far as republishing the will is concerned, a codicil has just the same effect whether or not it contains an express confirmation of the will, and I think the ratio decidendi in *In re Waring* (2) is as applicable to the facts in the present case and *In re Tredgold* (3) as to the facts in that case. That the express

(1) [1944] 1 K. B. 264.

(2) [1942] Ch. 426.

(3) [1943] Ch. 69.

confirmation has no greater weight in republishing the will than the fact that a codicil is made to the will has been pointed out in many cases. It is sufficient for present purposes to refer to the judgment of Chitty J. in *In re Elcom* (1). I agree with the Master of the Rolls that when Lindley L.J., in the same case (2), said that it was immaterial that the testatrix did not in terms "republish her will," he was in truth referring to the absence of an express confirmation in the codicil and not to the doctrine of republication. Simonds J. in *In re Tredgold* (3) said: "If . . . . the true meaning of "a confirmatory clause is that it is to be read as if the testator "had written out anew in the codicil itself the words of his "will with such alterations as were therein contained, it can, "I think, be said that the provision is contained in the "codicil, for the testator is there in his codicil expressing in "shorthand his testamentary intentions. The codicil is the "final expression of his whole will." With all respect to the learned judge, I think so to regard the codicil for the purposes of the section under consideration is to ignore the words of the section itself, the essential difference between a will and a codicil, and the real relationship of the one to the other. Using Swinburne's simile, it is to transform the codicil from the boat commonly tied to the ship into the ship itself and then to scuttle the ship. I have not thought it necessary to deal further with the cases cited. They have been dealt with in the judgment of the Master of the Rolls, which I have had the opportunity of considering, and with which I am in complete agreement.

With regard to the second question, after some hesitation I find myself in agreement with the judgment of the Master of the Rolls and my brother MacKinnon, and I respectfully accept the conclusion at which they have arrived and the reasons they have given for it. For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Waltons & Co.*

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(1) [1894] 1 Ch. 303, 309.

(2) Ibid. 312.

(3) [1943] Ch. 73.

H. C. G.

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March 1.

In re A DEBTOR.

JACOBS *v.* LLOYD.

Bankruptcy—Evidence—Debtor as witness—Called by trustee in bankruptcy—Right of trustee to cross-examine debtor on answers given at public or private examination.

If, in the course of an application in bankruptcy proceedings, the debtor, in giving evidence, says anything contrary to what he has already said at his public or private examination, he may be asked questions on the answers given by him at those examinations by counsel who has called him as a witness.

MOTION.

In a motion by a trustee in bankruptcy for a declaration that certain articles of furniture were the property of the debtor, the question arose whether, although the trustee was calling the debtor as a witness in support of his case, he was entitled to cross-examine her on the answers given by her at her public and private examinations.

Laski K.C. and *A. S. Diamond* for the trustee.

Sir George Jones K.C. and *G. F. Kingham* for a party interested.

MORTON J. Mr. Laski intimated in his opening that he desired to put to the debtor certain answers given by her at her public examination and private examination notwithstanding that he was calling her as a witness in support of the trustee's case. He referred to three cases. The first is *In re Osborne* (1), the report of which is brief and as follows: "This was a motion by the trustee against a stranger to the "bankruptcy. Counsel for the trustee called the bankrupt "as his witness and asked leave to cross-examine him and to "put the notes of his public examination to him. Counsel "for the respondent objected." Wright J. said: "I think "the trustee should be allowed to put any fair question to the "bankrupt, and confront him with what he has said on his "public examination. It is not quite the same as cross-"examining one's own witness in a common law action, "because in bankruptcy the bankrupt is often the only witness

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(1) (1899) 43 Sol. J. 480.

"that either side can call to give any information as to the "facts of the case." The next case was *In re Cunningham* (1), which was a motion by the official receiver as trustee in the bankruptcy to set aside an agreement between the debtor and his mother, the respondent, with reference to certain furniture. Counsel for the official receiver called the debtor as a witness in support of the application, but, owing to his unsatisfactory answers to questions asked by them, proposed to cross-examine him as to answers given by him at his public examination. Counsel for the respondent objected. Wright J. said: "I think it is highly desirable that the practice in "bankruptcy should be that either party to an application "should be at liberty to elicit from the bankrupt when called "as a witness what account he has given of a matter on a "previous occasion without regard to who calls him. It is "important that this practice should be known." Mr. Kingham informed me that that practice had not been followed by Horridge J., but he was not able to refer me to any reported case on the subject. However, on the matter being gone into in argument, it appeared that the practice of Horridge J. was that he would not, in the first instance, allow the answers of the debtor at his public examination to be put to him, but that, if he gave answers contrary to what he had previously said, the answers given at his public examination could be put to him.

It seems to me that the practice laid down by Wright J. is most convenient and one which is calculated to lead to the establishment of the truth. If the debtor is called as a witness, it is no doubt true that, in the first instance, he should not be asked leading questions any more than any other witness, and, if counsel started at once by putting to him what he had said in his public examination that might be open to objection as a leading question. In my view, however, it is the rule that if the debtor says anything contrary to what he said at his public examination, counsel may put to him what he did say at that examination whether the counsel examining him has called him as a witness or is cross-examining him. I entirely and respectfully agree with the observations of Wright J. in the two cases to which I have referred, and I do not think that there has been any departure in recent years from the practice stated by him. The third case to which Mr. Laski referred me, *In re Fitzgerald, Ex parte Hobbs* (2), carries the

(1) (1898) 6 Mans. 199.

(2) (1916) H. B. R. 157.

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matter no further than that it is the duty of a bankrupt as such to come to the court and give evidence, quite apart from any question of a subpœna. That would not seem to assist me.

It was not contended that I ought to draw any distinction between the public and the private examination. Accordingly, I shall treat both examinations as being on the same footing.

Solicitors: *J. N. Nabarro & Sons*; *H. H. Lloyd.*

J. L. D.

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Apr. 21, 24, 25, 26, 27, 28; *May* 26
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KANSSEN *v.* RIALTO (WEST END), LIMITED AND OTHERS.

Company—Director—Defect in qualification—De facto directors—Purported appointment of director—Purported issue of shares—Bona fide purchaser for value—Constructive notice of defect—Duty to inquire—Derivative title—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 143; *Sch. I., Table A, reg.* 88.

At the end of 1939 the plaintiff and C. became the first directors of a company, each being the registered holder of one of the only two shares then issued. The articles incorporated reg. 88 of Table A. in sch. I. to the Companies Act, 1929 (which is similar in effect to s. 143 of the Act, which provides that the acts of a director shall be valid, notwithstanding any defect that may afterwards be discovered in his appointment or qualification). The company, C., and one S. alleged, and the plaintiff denied, that S. was appointed a director at a meeting held on February 1, 1940, and Cohen J. found that no such meeting was held. There was a purported confirmation of this appointment at an extraordinary general meeting on April 26, 1940, by the votes of C. & S., the plaintiff dissenting. Before this general meeting, C. and S. had purported to determine the plaintiff's directorship, and to issue seven additional shares to C. and one share to S., in respect of which he voted on April 26. In 1941 the annual general meeting at which, under the articles, the plaintiff and C. would have vacated office, was not held, so that after December 31, 1941, there were no de jure directors. In March, 1942, C. and S. purported, as directors, to appoint M. a director, and, on C.'s application and payment therefor, to allot the remaining ninety shares of the company at C.'s request, thirty-four to M., thirty-two to S. and twenty-four to C. himself. S. later transferred seventeen of his shares to M. Before his purported appointment and the allotment of shares to him, M. had notice that the plaintiff was contesting the validity of S.'s appointment, and asserting that he (the plaintiff) and C. were the only directors of and shareholders in the company, but, without inquiring of the plaintiff, M. accepted an assurance by the company's solicitor, speaking on instructions received from C. and S., that the plaintiff had been duly removed from the board and S. duly appointed to it. The plaintiff claimed (*a*) a declaration that S. was not a director of the company; (*b*) rectification of the share register by the removal therefrom of all entries subsequent to the issue of the original two shares to himself and C.; (*c*) a declaration that M. was not a director; (*d*) a declaration that the only directors were himself and C.; (*e*) an injunction restraining M. and S. from acting as directors and restraining any further issue or transfer of shares; (*f*) alternatively, damages against C. and S. for procuring a breach of the contract subsisting between the company and the plaintiff by issuing such shares. Cohen J. found for the plaintiff on issues (*a*), (*c*) and (*e*), and for the defendants on (*d*) and (*f*). As to (*b*), he found that the shares were improperly issued, and that S. must be removed from the register, as must C. except as to his original share, but he held that M. was entitled to rely on s. 143 of the Companies Act, 1929, and reg. 88 of Table A. as validating the issue of shares to him. The plaintiff appealed on this issue, and also on (*f*). M. cross-appealed as to (*c*):—

Held, (1.), that s. 143 of the Companies Act, 1929, and reg. 88 of Table A. apply where one party to a transaction is unaware of a defect, though the other parties or some of them may be aware of it; but (2.) that M. was put on inquiry as to the position of S., and, as he had made no inquiries of the plaintiff, which inquiries would not necessarily have been abortive, he could not rely on s. 143 or reg. 88 to validate the issue of shares to him. (3.) On the ground, also, that M.'s title was derivative from C. and S. he could not rely on the section, which was only intended to protect innocent persons in transactions to which they were themselves parties, and a transferee could have no better title than his transferor. (4.) M.'s cross-appeal failed, for similar reasons. (5.) The plaintiff's alternative appeal as to damages, which was not argued, would stand over for argument if the House of Lords should reverse the judgment on the main appeal.

Judgment of Cohen J. (ante p. 154), reversed.

APPEAL from Cohen J.

The defendant company, Rialto (West End), Ld., was incorporated as a private company on December 27, 1939, with the primary object of acquiring the lease and carrying on the business of the Rialto cinematograph theatre, Coventry Street, London, W. The nominal capital of the company was 100*l.* divided into 100 shares of 1*l.* Two shares only were issued on incorporation, one to each of the pro forma signatories of the memorandum, two solicitor's clerks, who on the following day appointed the defendant, Robert Cromie, and the plaintiff, Theodore Kanssen, to be the directors of the company, and transferred their shares to Mr. Cromie and Mr. Kanssen

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respectively. Cromie became chairman and Kanssen managing director.

The articles of the company included Table A with certain modifications, of which the following were material: Art. 7: "Until otherwise determined by the company in "general meeting the number of directors shall not be less "than two." Art. 8: "The office of a director shall be "vacated . . . . (7) If he be requested in writing by a "majority of the directors to resign." Art. 22: "The words "'at the second' shall be substituted for the words 'at the "'first' in reg. 73 of Table A" (which provides that at the first ordinary general meeting of the company the whole of the directors are to retire). Art. 25: "The quorum necessary "for the transaction of the business of the directors may be "fixed by the directors, and unless so fixed shall be two, and "reg. 82 of Table A shall not apply." By reason of the exclusion of reg. 66 of Table A, the directors required no share qualification.

The defendants alleged that a board meeting was held on February 1, 1940, at which the defendant, Eric Paul Strelitz, was appointed a director of the company and the plaintiff's office of managing director was dispensed with, and, further, that the minutes of this meeting were confirmed at the next meeting on March 6, 1940. The minute book of the company contained minutes to that effect. The plaintiff denied that either of these two meetings ever took place, and Cohen J. found that they did not. On April 9, 1940, Cromie and Strelitz gave to the plaintiff a notice in writing, purporting to be under art. 8 (7.), requesting him to resign his office as a director. On April 12 there was a purported issue of seven further shares to Cromie and one share to Strelitz which the plaintiff alleged to be invalid as it was made without his knowledge or consent by Cromie and Strelitz purporting to act as directors. The annual return for 1940 showed ten shares in all as issued. An extraordinary general meeting of the company was held on April 26, 1940, at which Cromie and Strelitz purported to confirm the appointment of Strelitz as a director, the plaintiff dissenting. The first annual meeting, which was attended only by Cromie, Strelitz and the secretary, was held on December 4, 1940. No annual general meeting was held in 1941. On March 30, 1942, Cromie wrote to the defendant, Louis Morris, setting out the terms on which Morris had agreed to join the company, including (inter alia): "(1.) That "you be appointed a director of the company . . . . (4.) At "the present time there are ten issued shares in the company "of which I hold eight, and two other gentlemen hold one "each. I will take steps to have the remaining 90 shares "allotted, and will see that of the issued shares you always "hold one-third, Mr. Strelitz holds one-third and I hold "one-third. You and I and Mr. Strelitz, as shareholders, "will then take steps to increase the capital of the company "by a further 500*l.* and these shares will be held as to one-"third by you, one-third by me and one-third by Mr. Strelitz." This 500*l.* was to be provided by Morris, Cromie providing 500*l.* for war damage expenses, subject to a similar division of shares. The purported increase of capital to 1,100*l.* was made on April 13, 1942, but no new shares were issued. On the same day Cromie and Strelitz, without the plaintiff's knowledge or consent, purported to appoint Morris managing director of the company. Before his appointment he had notice that the plaintiff was contending that Strelitz was not a director and that the only shares validly issued were the original two, but he was assured by the solicitor to the company that the plaintiff had been properly removed from the board and that Strelitz had been properly appointed. He made no inquiries of the plaintiff, but accepted that assurance. At the same meeting the remaining ninety shares were allotted, thirty-four to Morris, thirty-two to Strelitz, and twenty-four to Cromie. On April 20, 1942, Strelitz transferred seventeen of his shares to Morris giving him fifty-one in all, which amounted to a controlling interest in the company. On the same day the plaintiff issued a writ against the company, claiming rectification of the share register by omitting therefrom all shares other than the two originally issued and transferred to Cromie and the plaintiff and damages sustained by the plaintiff by reason of the improper inclusion of other persons as shareholders. Cromie, Strelitz and Morris were later made defendants in this action, and an injunction was asked to restrain them from allotting or disposing of further shares without the plaintiff's concurrence. A second writ was issued on April 13 against the company, Strelitz and Morris, asking a declaration that Strelitz and Morris had not been duly appointed, and an injunction restraining them from acting as directors, and for a declaration that the only directors of the company were the plaintiff and the defendant, Cromie.

Cohen J. found (1.) that, the alleged board meetings of

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February 1 and March 6, 1940, never having taken place, there was no appointment of Strelitz as a director by the board; (2.) that the purported confirmation of his appointment by the general meeting of April 26, 1940, was ineffective as it depended on Strelitz's own vote, when he was not a member of the company, he having had no right to act as a director in the purported allotment to himself of a share on April 12 so that that allotment was bad; (3.) that Morris was not validly appointed a director of the company, nor were the ninety shares validly allotted on March 30, 1942; (4.) that, as no annual meeting was held in 1941, all the directors of the company went out of office on December 31, 1941, the last date on which the second annual general meeting could lawfully have been held, and that thereafter there were no directors of the company. He held that the plaintiff was not entitled to the declaration asked for that he and Cromie were the only directors of the company, and that the register must be rectified by the removal therefrom of Strelitz and the cancellation of all shares held by him and Cromie, except the original share held by the latter. With regard to Morris, he held that he was not entitled to rely, so far as his directorship was concerned on s. 143 of the Companies Act, 1929, or on reg. 88 of Table A, but that he was entitled to uphold, in reliance on that section and regulation, the allotment to him of the thirty-four shares and the transfer to him of the seventeen shares from Strelitz. He further held that the plaintiff was not entitled to damages. The plaintiff appealed against so much of the judgment as related to Morris's shares and to damages, and the defendant, Morris, cross-appealed against the finding relating to his directorship.

Raymond Jennings and *M. Albery* for the plaintiff.

Richmount for the defendants, Cromie and Strelitz.

Christie K.C. and *Hillaby* for the defendant, Morris.

The arguments sufficiently appear from the judgments. The following authorities were cited: *Dawson* v. *African Consolidated Land and Trading Co.* (1); *British Asbestos Co. Ld.* v. *Boyd* (2); *Channel Collieries Trust, Ld.* v. *Dover, St. Margaret's and Martin Mill Light Ry. Co.* (3); *South London Greyhound Racecourses, Ld.* v. *Wake* (4); *Mahony* v. *East Holyford Mining Co.* (*Liquidator*) (5); *Sheffield* (*Earl*) v. *London Joint Stock*

(1) [1898] 1 Ch. 6.

(2) [1903] 2 Ch. 439.

(3) [1914] 2 Ch. 506.

(4) [1931] 1 Ch. 496.

(5) (1875) L. R. 7 H. L. 869.

Bank (1) for the plaintiff; and, in addition, *B. Liggett (Liverpool), Ld.* v. *Barclays Bank, Ld.* (2); *Royal British Bank* v. *Turquand* (3); *Charity Commissioners* v. *Bode* (4); *Cave* v. *Cave* (5); *Transport, Ld.* v. *Schonberg* (6) for the defendant Morris.

Cur. adv. vult.

May 26. Lord Greene M.R. read the following judgment. Before Cohen J. the plaintiff in these consolidated actions succeeded in part and failed in part. He succeeded in obtaining a declaration that there were no directors of the company and an order rectifying the register by deleting (*a*) the name of Mr. Strelitz as the holder of one share said to have been allotted to him at a board meeting on April 12, 1940, and of fifteen shares part of an allotment of thirty-two shares said to have been made to him at a board meeting on March 30, 1942, (*b*) the name of Mr. Cromie as the holder of twenty-four shares said to have been allotted to him at the last-mentioned board meeting. The plaintiff, however, failed in his claim to have the register rectified in respect of fifty-one shares standing in the name of Mr. Morris, thirty-four of which were said to have been allotted to Mr. Morris at the board meeting of March 30, 1942, the remaining seventeen of which formed part of the thirty-two shares said to have been allotted to Mr. Strelitz as already mentioned and to have been subsequently transferred to Mr. Morris. It will be seen at once that the plaintiff's failure in this respect destroyed the real advantage of his successes, since Mr. Morris, as holder of fifty-one out of fifty-three issued shares, has complete control of the company. The plaintiff, accordingly, appeals to this court and claims to have the register rectified in respect of all the shares which stand in the name of Mr. Morris. He also claims, as he claimed below, that in the event of the right of Mr. Morris to have his name retained on the register being affirmed, Mr. Cromie and Mr. Strelitz are liable to pay damages for procuring a breach by the company of the contract subsisting between the company and the plaintiff by virtue of s. 20 of the Companies Act, 1929, the alleged breach consisting of allotting the shares held by Mr. Morris to the detriment of the plaintiff. This latter claim does not, of course, arise if it be held that Mr. Morris's name must be removed from the register. It was dealt with by Cohen J. after he had decided that Mr. Morris was entitled to his shares, and he dismissed it. We have not heard argument on it, as it must first be decided whether or not the plaintiff is entitled to succeed on his main contention with regard to the title of Mr. Morris to the fifty-one shares. The parties interested in that contention are Mr. Morris and the company, which, although made a respondent to the appeal by the plaintiff, did not appear before us. Mr. Cromie and Mr. Strelitz have no direct interest in the main contention. Their interest begins only if that contention is rejected and the claim for damages against them comes up for decision.

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(1) (1888) 13 App. Cas. 333.

(2) [1928] 1 K. B. 48.

(3) (1855) 5 E. & B. 248; in Exchequer Chamber (1856) 6 E. & B. 327.

(4) [1901] 2 Ch. 750.

(5) (1880) 15 Ch. D. 639.

(6) (1905) 21 T. L. R. 305.

The shares which now stand in the name of Mr. Morris were, as I have already said, all alleged to have been allotted at a board meeting on March 30, 1942. There were present Mr. Cromie, Mr. Strelitz and Mr. Mackay, the company's solicitor. Neither Mr. Cromie nor Mr. Strelitz was then a director of the company. Mr. Cromie had been a director, but he had vacated office on December 31, 1941, by reason of art. 73 of the company's articles of association: see *In re Consolidated Nickel Mines* (1), a fact which nobody at the time seems to have appreciated. Mr. Strelitz had never been validly appointed a director since, as the judge found the pretended board meeting of February 1, 1940, at which it was alleged that he had been elected never took place, while at the general meeting on April 26, 1940, at which this alleged appointment was said to have been confirmed, the vote of Mr. Strelitz by which the confirmatory resolution was said to have been carried was improperly given, Mr. Strelitz not being entitled to the shares in respect of which he purported to vote. In passing, it may be noted that the plaintiff ceased to be a director on December 31, 1941, for the same reason as Mr. Cromie.

The first business at the meeting of March 30, 1942, was to appoint Mr. Morris a director and managing director of the company. This appointment was clearly invalid in itself by reason of the fact that Mr. Cromie and Mr. Strelitz were not directors. It was held by Cohen J. that it was not validated either by s. 143 of the Companies Act, 1929, or by reg. 88 of

(1) [1914] 1 Ch. 883.

Table A, of which more will be said later. By a notice of cross-appeal Mr. Morris claims that this view was incorrect and that the declarations made by Cohen J. that there were no directors at the date of his judgment should be amended accordingly. The next thing that happened was that Mr. Morris joined the so-called board, which, according to the minute book, proceeded to receive an application from Mr. Cromie for ninety shares of 1*l.* each in the capital of the company, together with his cheque for 90*l.* The application asked that the shares be allotted, thirty-four to Mr. Morris, thirty-two to Mr. Strelitz and twenty-four to Mr. Cromie himself. It was resolved that the shares be allotted accordingly. Taken by themselves this allotment and the subsequent entries in the register (which are dated the same day) were unquestionably invalid. The sole question which arises on this part of the appeal is whether or not they are (so far as regards the fifty-one shares now standing in the name of Mr. Morris) validated either under s. 143 of the Companies Act, 1929, or reg. 88 of Table A (as Cohen J. held they were), or, alternatively, under the rule known as the rule in *Royal British Bank* v. *Turquand* (1). So far as regards the shares allotted to Mr. Cromie and that part of the allotment to Mr. Strelitz which still stood in his name (i.e. the fifteen shares), Cohen J. held that no such validation took place. Mr. Cromie and Mr. Strelitz who, to use the words of Cohen J. " recklessly " deposed to events which never took place," and endeavoured to support their evidence by reference to a minute which they knew to be fabricated were perfectly well aware that Mr. Strelitz had never been appointed a director and had no shadow of a right to act as such. They were incompetent to appoint Mr. Morris to the board, and, owing to the defect in the appointment of Mr. Strelitz, there was no properly constituted board capable of passing the resolution for the allotment of the shares. So far as regards the remaining thirty-four shares allotted to Mr. Morris at the meeting and the seventeen shares part of the allotment made to Mr. Strelitz which had been transferred to Mr. Morris on April 20, 1940, Cohen J. held that Mr. Morris was, in the case of the thirty-four shares at the date of allotment, and, in the case of the seventeen shares at the date of the transfer, unaware of the defect in the qualification of Mr. Cromie and Mr. Strelitz to act as directors. It is not suggested that he was aware of the defect in the qualification of Mr. Cromie since nobody appears to have realized that Mr. Cromie had vacated office on December 31, 1941. The question, therefore, is confined to the knowledge or imputed knowledge of Mr. Morris with regard to the qualification of Mr. Strelitz.

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(1) 6 E. & B. 327.

It is not established that Mr. Morris had actual knowledge of the fact that Mr. Strelitz was not a director of the company. He did, however, know at the crucial time in March, 1942, that the plaintiff was alleging that Mr. Strelitz was not a director, but he was assured by Mr. Cromie and by Mr. Mackay, the company's solicitor, in the presence of Mr. Strelitz, that there was no ground for any such allegation. He accepted their statements as correct without making any investigation, whether by inquiring from the plaintiff or otherwise. He did not ask to see the company's minute book or even the entry containing a resolution appointing Mr. Strelitz.

As I have already said the sole question raised by the plaintiff's appeal is as to the validity of the allotment of the fifty-one shares standing in the name of Mr. Morris. This allotment was made by three persons, two of whom, namely, Mr. Cromie and Mr. Strelitz (who, in fact, were not directors), knew that Mr. Strelitz was not entitled to act as a director, and one of whom, namely, Mr. Morris, had just been appointed by the two former but had no actual knowledge of the defect in their qualification or of any lack of power in any of the three of them to pass the resolutions appointing him a director and allotting shares. Mr. Morris claims that, notwithstanding the fact that Mr. Strelitz was, to the knowledge of Mr. Cromie and Mr. Strelitz, not a director de jure, he is entitled to rely on s. 143 and reg. 88, or, alternatively, on the rule in *British Bank* v. *Turquand* (1) as being the original allottee in respect of the thirty-four shares and as a transferee in respect of the seventeen shares which he acquired from Mr. Strelitz. On the facts as found by Cohen J. the assurances given to Mr. Morris were not true. Mr. Mackay was clearly speaking on instructions and no suggestion is made against his good faith in the matter. Mr. Cromie knew, as did Mr. Strelitz, that the meeting at which Mr. Strelitz was ostensibly (according to the minute book) appointed as a director had never taken place and that the entry with regard thereto was a fabrication. It is to be noted that even if Mr. Strelitz had been appointed as the fabricated minute purported to record he would not have been a director in March, 1942, since he would, like

(1) 6 E. & B. 327.

Mr. Cromie and the plaintiff have ceased to be a director on December 31, 1941. Similar observations apply to the plaintiff's claim to be a director. Mr. Morris knew of the plaintiff's claim that Mr. Strelitz was not a director, but acted on the assurances given to him that there was no foundation for it. As I have already said, the plaintiff had, in fact, ceased to be a director, so nothing turns on his claim to have been a director at the time.

Section 143 of the Companies Act, 1929, is as follows: "The acts of a director or manager shall be valid notwith- "standing any defect that may afterwards be discovered in "his appointment or qualification." Regulation 88 of Table A (save that it is confined to the case of directors) is to the same effect, although its language is more elaborate. It was not suggested that for the purposes of this appeal its operation is more extended than that of the section, and, accordingly, it will be sufficient to deal with the section alone without further reference to the regulation.

Three main arguments with regard to the effect of the section were put forward on behalf of the plaintiff. I will summarize them in what appears to me to be the most convenient order. (1.) It was said that the section only applies where, at the time when the act which it validates is performed, no discovery of the defect in the appointment or qualification has been made by any party concerned in the act. In the present case it was said that when the act of allotting the fifty-one shares now standing in the name of Mr. Morris was performed two of the actors, viz., Mr. Cromie and Mr. Strelitz, were aware of the defect in the qualification of Mr. Strelitz and also of the defect in the appointment of Mr. Morris which could only have been valid de jure if both Mr. Cromie and Mr. Strelitz had been directors at the time when the purported appointment of Mr. Morris to the board was made. (2.) Alternatively, it was said that Mr. Morris was put on inquiry as to the right of Mr. Strelitz to act as a director and so cannot rely on the section as validating the allotments under which he claims. (3.) In the further alternative, it was said that the allotment of the thirty-four shares to Mr. Morris on March 30, 1942, was made to him as nominee of Mr. Cromie who paid the company for the shares, that Mr. Cromie knew of the defect in the qualification of Mr. Strelitz and the defect in the appointment of Mr. Morris, that Mr. Cromie, being a party to the act of allotment by making the application for the shares

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could not himself claim that the act was validated by the section, and that Mr. Morris, as the nominee of Mr. Cromie, cannot claim that by virtue of the section he is entitled to be put in a better position than Mr. Cromie would have been in if the shares had been allotted to Mr. Cromie himself. With regard to the seventeen shares it was said that the shares were not validly allotted to Mr. Strelitz in the first instance and that the section did not enable Mr. Strelitz to pass to Mr. Morris a better title than he himself possessed.

I will deal with these arguments in order. (1.) Cohen J. rejected the first argument, relying, particularly, on the language of Lord Cozens-Hardy M.R., in *Channel Collieries Trust, Ld.* v. *Dover, St. Margaret's and Martin Mill Light Railway* (1). I have carefully considered the various cases decided on this and similar sections. In all of them, (including *Mahony* v. *East Holyford Mining Co.* (2), as will appear from a study of that case) there was no knowledge of the existence of a defect on the part of anyone concerned. The point raised by this argument is, so far as direct authority is concerned, a novel one. It is pointed out that the language of the section, read literally, gives an absolute, not a relative, validity to the acts with which it deals and speaks of the defect being " afterwards discovered," without limiting that phrase to the person claiming the protection of the section. It seems to me, however, that the construction contended for would cut down the beneficial operation of the section to a very serious extent and produce results so surprising that I feel constrained to reject it. It would mean, for instance, that if a de facto board, acting in ignorance of any defect, sold goods to a third party who was aware of the defect, the board would be liable to an action for conversion at the instance of the company. Conversely, it would mean that a purchaser in ignorance of the defect could not maintain an action on the contract if the board was aware of the defect. This, it seems to me, would be quite contrary to the way in which the effect of the section has been regarded, and, although the precise point has not been decided, the observations of Lord Cozens-Hardy M.R., appear to me, as they appeared to Cohen J., to be good sense and good law. This conclusion brings the operation of the section into line with that of the rule in *Turquand's* case (3) as regards the area in which they

(1) [1914] 2 Ch. 506, 512.
(2) L. R. 7 H. L. 869.
(3) 6 E. & B. 327.

overlap. Under both, the person claiming protection is entitled to it if he is ignorant of the irregularity notwithstanding that those purporting to act for the company are aware of it. This correspondence between the section and the rule is not without importance in considering the next question which arises and makes it unnecessary to give separate consideration to the rule for the purposes of this appeal.

(2.) It is settled that in cases where the knowledge of the de facto board itself is the material consideration it is sufficient to bring the section into operation if knowledge of the defect is not present to the mind of the board at the relevant time, notwithstanding that the facts are known. In *British Asbestos Co., Ld.* v. *Boyd* (1), Farwell J. said " It is not, therefore, that " the facts are not known, but that the knowledge of the " defect is not present to the mind of any person to whom it " is material at the time to know it," a statement of the law which was subsequently approved in this court (2). I read this as meaning that the same principle applies where the knowledge of a third party is the material consideration. On this basis, if Mr. Morris knew the facts but was not aware that they constituted a defect (assuming that to have been a possible state of mind) he could (subject to the third argument) say that the section operated in his favour in respect of the allotment of his shares, but he did not even know the facts since he did not know that the statements made to him that Mr. Strelitz was a director were untrue or that the minute purporting to record his election was a fabricated document. This by itself would appear to place him in an even stronger position but for one circumstance the effect of which now falls for consideration. It is said that matters were brought to his notice which were sufficient to put him on inquiry as to what the actual facts were, and that, if he had inquired into the facts, he would inevitably have discovered that Mr. Strelitz had no right to act as a director. The first question which arises here is whether a person, notwithstanding that he acts in good faith, is precluded from claiming the protection of the section if he is put on inquiry. Cohen J. considered that he is so precluded, and, in my opinion, he was right. He was of opinion that this principle which was held (and, in my respectful opinion, rightly held) by Wright J. to be applicable to the rule in *Turquand's* case: see *B. Liggett (Liverpool)* v. *Barclays Bank, Ld.* (3); is applicable also to cases under the section. I do not know of any branch of the law relating to civil rights and liabilities where a rule designed to protect a person who is ignorant of material facts can be relied on by a person who is put on inquiry and fails to make such reasonable inquiries as the circumstances demand. It would be a strange result if the strict principle applied to cases falling under the rule in *Turquand's* case (1) and a far less strict principle applied to cases under the section when it is remembered that the rule and the section to a considerable extent overlap one another and (if I am right in what I have said) the section, like the rule, is designed to protect persons who are ignorant of the defect, however fully aware of it the other party or parties to the transaction may be. That Mr. Morris was put on inquiry as to the right of Mr. Strelitz to act as a director the evidence leaves me in no doubt. Cohen J. thought that Mr. Morris was relieved of the consequences of this by the fact that, as he thought, inquiries would have led to no result. He thought that Mr. Morris was not in the circumstances bound to inquire of the plaintiff as to the reasons for which the plaintiff, to the knowledge of Mr. Morris, was disputing the right of Mr. Strelitz to act as a director, that the obvious and reasonable step would have been to ask to see the minute book, that, if he had done so, the book containing the fabricated minutes would have been produced to him, and that he would reasonably have relied on it. I do not agree that there was no obligation on Mr. Morris to inquire of the plaintiff. What Mr. Morris did was to accept the statement of parties who were obviously interested in disputing the correctness of the plaintiff's allegations and the statement of their solicitor who could only speak on their instructions. It would, as it seems to me, make a serious inroad in the rule applicable to persons put on inquiry if it could be said that all that they need do in such a case as this is to make inquiries of the very persons who are interested in giving a reassuring answer and that they can safely refrain from addressing themselves to the person who is asserting that the answer is untrue. If this is too harsh a view I still find myself unable to agree with the opinion of Cohen J. with regard to what would have happened if Mr. Morris had asked to see the minute book. If, in response to such a request, the minute book had been handed to him by Mr. Cromie or Mr. Strelitz or Mr. Hills, the secretary, without comment,

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(1) [1903] 2 Ch. 439, 444.
(2) [1914] 2 Ch. 511.
(3) [1928] 1 K. B. 48, 56.

(1) 6 E. & B. 327.

the person so handing it would have been making a false representation as to its genuineness. A truthful person, in handing the book to Mr. Morris, would have been bound to tell him that the relevant entries had been fabricated, and that would have been an end of the matter. Ought it to be assumed that such a false representation would have been made, however likely, humanly speaking, that may have been? I do not think so. In *A. L. Underwood, Ld.* v. *Bank of Liverpool* (1), Bankes L.J. quoted with approval a well-known passage from the judgment of Lord Romilly in *Jones* v. *Williams* (2) which has always, so far as I am aware, been accepted as a correct statement of the law. It is as follows: "With respect to the argument that it was unnecessary to "make any inquiry because it would have led to no result, "I think it impossible to admit the validity of this excuse. "I concur in the doctrine of *Jones* v. *Smith* (3), that a false "answer, or a reasonable answer given to an inquiry made, "may dispense with the necessity of further inquiry, but "I think it impossible, beforehand, to come to the conclusion "that a false answer would have been given, which would "have precluded the necessity of further inquiry. A more "dangerous doctrine could not be laid down, nor one involving "a more unsatisfactory inquiry, namely, a hypothetical "inquiry as to what A. would have said if B. had said something other than what he did say." Atkin L.J. (4) expressed the same view. He said: "It was said that if inquiries "had been made Underwood could easily have made a lying "explanation, which would have set at rest any doubts. "I agree with the judge [Roche J.] that even if well founded "this would be an insufficient answer." For these reasons I am of opinion that Mr. Morris cannot rely on the section.

(3.) But there is a further reason why I take this view. Cohen J. held that Mr. Morris could rely on the section as validating his title to the seventeen shares transferred to Mr. Morris by Mr. Strelitz although Mr. Strelitz himself could not have relied on it in respect of the allotment to him of those shares. I venture to take a different view. The section, in my opinion, only protects persons who are parties to the act the validity of which is in question, and I do not see how a person with only a derivative title comes within its scope. Such a person cannot, I think, stand in a better position than the person from whom he derives his title. It is on the title of the transferor that the transferee must rely, not on the ostensible validity of an act to which the transferee was no party. No question of estoppel arises, no reliance being placed on any certificate issued to Mr. Morris. The facts with regard to the thirty-four shares are different. According to the minute of March 30, 1942, the accuracy of which, on the evidence, is not subject to controversy, the application for the ninety shares was made by Mr. Cromie and paid for by his cheque. Mr. Morris did state that he paid for his thirty-four shares, but this can mean no more than that he subsequently paid Mr. Cromie. The terms on which Mr. Morris was to become interested in the company are contained in a letter of March 30, 1942, from Mr. Cromie to Mr. Morris, which was read at the meeting. In cl. 4 of this letter Mr. Cromie states that he will take steps to have the remaining ninety shares in the existing capital allotted and would see that of the issued shares Mr. Morris always held one-third, Mr. Strelitz one-third, and Mr. Cromie himself one-third. This appears to imply that Mr. Morris was eventually to pay for the shares in the existing capital which were to be allotted to him. It appears to me from the minute either that Mr. Cromie was, as between himself and the company, acting as principal (in which case Mr. Morris was merely a nominee between whom and the company there was no privity) or that he was acting as agent for Mr. Morris in applying for the shares allotted to Mr. Morris. In neither case, it seems to me, can Mr. Morris claim that he can stand in a better position than Mr. Cromie himself. If the former view is right, Mr. Morris was no party to the act of the de facto board save as a mere volunteer accepting shares issued to him at the request of Mr. Cromie. This would not be affected by the fact that as between himself and Mr. Cromie he was liable to pay Mr. Cromie for the shares. If the latter view is right, the knowledge of the defect which the agent had must be imputed to the principal. In neither case can Mr. Morris claim to be in a better position than Mr. Cromie himself would have been in if the shares had been allotted to him. For the reasons which I have given I am of opinion that the second argument of Mr. Jennings on behalf of the plaintiff is entitled to succeed, and that, if this view is not correct, his third argument must prevail. The appeal, therefore, succeeds, and the register must be rectified by deleting the name of Mr. Morris as holder of the fifty-one shares standing in his name. The alternative claim for damages does not arise for consideration (1).

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(1) [1924] 1 K. B. 775.

(2) (1857) 24 Beav. 47, 62.

(3) (1841) 1 Hare 43.

(4) [1924] 1 K. B. 775, 798.

It remains to deal shortly with the cross-appeal of Mr. Morris claiming that he is a director. Mr. Christie frankly admitted that this claim was purely defensive and he did little more than enunciate it. In my opinion, it cannot succeed. The board that purported to appoint him as a director was in law incompetent, and it is clear that, where such a board, in ignorance of the defect in its appointment or qualifications, purports to appoint an additional director, the section does not operate to make him a director, however much it may validate acts done by him in the belief that he has been validly appointed. If it were otherwise, he could claim to be a director and to act validly as such after the discovery of the defect, a result which cannot be extracted from the section. As a matter of fact, the point was decided by Sargant J. in the *Channel Collieries Trust* case already cited and his decision was affirmed by this court (2).

The appeal will be allowed in so far as it relates to rectification. There will be an order for rectification accordingly, and the usual direction to the company to notify the Registrar of Companies. The company must repay 34*l.* to Mr. Cromie and 17*l.* to Mr. Strelitz, but, if Mr. Cromie and Mr. Strelitz consent, the order will be to repay these sums to Mr. Morris. Mr. Morris must pay the plaintiff's costs of the appeal except so far as they relate to the alternative claim for damages against Mr. Cromie and Mr. Strelitz. Mr. Cromie and Mr. Strelitz must bear their own costs of the appeal. The order of Cohen J. as to costs will stand. Mr. Morris must pay the costs of his cross-appeal.

MacKinnon L.J. I agree. I had written a judgment setting out my reasons for that conclusion, but, on reading the judgment prepared and just delivered by the Master of the Rolls, I was so satisfied with its lucidity and completeness that I have destroyed my own decision.

Luxmoore L.J. I have not thought it necessary to write a separate judgment, for I have had the opportunity of considering the judgment which has been delivered by the Master of the Rolls. I have found myself in complete agreement with the conclusions at which he has arrived and the reasons which he has given for arriving at those conclusions. I agree with the order which the Master of the Rolls has stated should be made.

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(1) *Reporter's Note.*—Leave to appeal to the House of Lords was given to Mr. Morris, and the plaintiff's appeal as to damages was ordered to stand over to be restored for argument if the decision on the main point should be reversed on appeal.

(2) [1914] 1 Ch. 568, 578. [1914] 2 Ch. 506.

Appeal allowed: Cross-appeal dismissed.

Solicitors for plaintiff: *G. F. Wallace & Co.*
Solicitors for defendants Cromie and Strelitz: *Paisner & Co.*
Solicitors for defendant Morris: *Billinghurst, Wood & Pope.*

J. W. H.

VAISEY J.
1944
May 15, 16, 17, 18; *June* 6, 7.

RELIANCE PERMANENT BUILDING SOCIETY *v.* HARWOOD-STAMPER.

Building society—Mortgage—Realization of security—Sale in exercise of power—Obligation of society—"Best price which can reasonably "be obtained"—Building Societies Act, 1939 (2 & 3 *Geo.* 6, *c.* 55), *s.* 10.

By s. 10 of the Building Societies Act, 1939, where property is mortgaged to a building society, any person entitled to exercise a power of sale, statutory or express, must take reasonable care to ensure that the price at which the estate is sold is the best price which can reasonably be obtained:—

Held, that the section imposes a higher obligation in the exercise of a power of sale on a building society than on an ordinary mortgagee and places it in the same position as a fiduciary vendor, subject, however, to the qualifications: (1.) that the society may consult its own convenience as to the time of sale, (2.) that it has the wide discretion as to the mode of sale given by s. 101 of the Law of Property Act, 1925, and (3.) that, in accordance with s. 106 of the same Act, it will not be liable for any involuntary loss occurring in the execution of the power of sale.

Action.

The defendant, Gordon Thomas Harwood-Stamper, purchased the freehold property, Newbold House, Ruislip, Middlesex, in 1935, borrowing the bulk of the purchase money from the plaintiffs, the Reliance Permanent Building Society. In 1939 the defendant left the property vacant, and ceased paying principal and interest on the mortgage. In May, 1940, the plaintiffs went into possession of the property, and in

December, 1942, they sold it by private treaty for 700*l*. The amount due on the mortgage was then 1,203*l*., and the building society now claimed the balance, 503*l*. The defendant contended that the property was worth 1,800*l*., and that the sale had been effected at a gross undervalue without any care being taken to obtain a proper price, and he pleaded s. 10 of the Building Societies Act, 1939 (1).

Harman K.C. and *Monier-Williams* for the building society.
Guthrie for the defendant.

The arguments on the questions of law raised appear from the judgment.

VAISEY J. This case possesses a wider interest and a greater importance than arises from its particular facts because it involves the consideration of s. 10 of the Building Societies Act, 1939, which has not, I understand, so far received any judicial interpretation. Two views on this enactment have been submitted to me. Mr. Harman, for the building society, asks me to say that the section has no particular meaning or effect. He puts forward the view that the section is a mere reminder to building societies of their pre-existing responsibilities and a mere reassuring resumé for the comfort of mortgagors of what their rights in this matter are. Mr. Guthrie, for the defendant, on the other hand, submits that the section imposes on building societies an even higher liability than that which is laid on fiduciary vendors generally, such as trustees for sale or tenants for life, and involves the building society in responsibility for the consequences of even honest mistakes or errors of judgment, and he contends that the section introduces the conception of negligence as understood at common law and in these ways imposes on building societies what he repeatedly described as a very onerous and responsible duty. A middle view may well be that the building society when exercising its power of sale as mortgagee is by this section merely added to the list of fiduciary vendors, and that the same considerations apply to the exercise of a society's power of sale as would apply to an ordinary trustee for sale or trustee with a power of sale or to a tenant for life or other limited owner exercising a power of sale under the Settled Land Act, 1925.

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(1) By Building Societies Act, 1939, s. 10: " Where any freehold " or leasehold estate has been " mortgaged to a society as " security for an advance, it shall " be the duty of any person " entitled by virtue of the mort- " gage to exercise any power, " whether statutory or express, to " sell the estate, to take reasonable " care in exercising that power to " ensure that the price at which " the estate is sold is the best price " which can reasonably be ob- " tained; and any agreement, if " and in so far as it relieves, or may " have the effect of relieving, " a society or any other person " from the obligation imposed by " this section, shall be void."

I think it is necessary for me to consider briefly first what is the measure of liability in the case of a mortgagee exercising a power of sale apart from the special provisions of the section to which I have referred, and, secondly, what is the measure of liability of the ordinary fiduciary vendor, leading me to the third question, which is this: Is the building society mortgagee now, by reason of the section, under the former or the latter measure of liability or under some other and what measure of liability of a novel description? I realize that the answer which I give to the third question is one of serious importance not only to the plaintiffs in the present case, but to building societies generally.

First, as to the measure of liability of a mortgagee selling the mortgaged property under the general law and irrespective of the Building Societies Act, 1939. I was referred to several passages in well-known text-books, first, to Fisher and Lightwood's Law of Mortgage, 7th ed., p. 412, where these words occur: "The sale must also be effected"—that is a sale by a mortgagee—"with proper discretion; for the "mortgagee is bound to adopt such means as would be "adopted by a prudent owner to get the best price that can "reasonably be had; and a sale made at a fraudulent under-"value will be set aside. But the court will not set aside "a sale merely on the ground that it is disadvantageous, "unless the price is so low as to be in itself evidence of "fraud." I do not think that the authorities justify the statement that an ordinary mortgagee "is bound to adopt "such means as would be adopted by a prudent owner to "get the best price that can reasonably be had." The next sentence, as it appears to me, states the truism, that a sale made at a fraudulent under-value will be set aside. Observe that the words used in the text book are, "to get the best "price." In Halsbury's Laws of England, 2nd ed., vol. 23, p. 435, there is a notable variation in the language used. There it is stated in this way: "A mortgagee is not a trustee "for the mortgagor as regards the exercise of the power of "sale. He has his own interest to consider as well as that of "the mortgagor, and provided that he keeps within the "terms of the power, exercises the power bona fide for the "purpose of realizing the security, and takes reasonable "precautions to secure" not the best price but "a proper "price, the court will not interfere, nor will it inquire whether "he was actuated by any further motive. A mortgagee is "entitled to sell at a price just sufficient to cover the amount "due to him, provided the amount is fixed with due regard to "the value of the property." In Coote on Mortgages, vol. 2, 9th ed., at p. 927, the statement is, in my judgment, made with complete accuracy: "The only obligation incumbent on "a mortgagee selling under a power of sale in his mortgage is "that he should act in good faith. Whether selling under an "express or statutory power, he may generally conduct the "sale in such manner as he may think most conducive to his "own benefit, unless the deed contains any restrictions as to "the mode of exercising the power, provided he acts bona "fide and observes reasonable precautions to obtain" not the best price but "a proper price." That seems to me to state the position of the mortgagee with accuracy. The mortgagee, of course, sells primarily for his own benefit. The object of the sale is to realize the security and recover the money which he has lent. He is entitled to think of himself first. He must not ignore the mortgagor, but the whole purpose of the sale is to get his money back, and that I understand to be the radical difference between the case of the ordinary mortgagee and that of the fiduciary vendor.

Of the well-known cases which were cited to me in argument the earliest in point of date is the leading case, *Warner* v. *Jacob* (1). The headnote adequately sums up the position in these terms: "If a mortgagee exercises his power of sale "bona fide for the purpose of realizing his debt and without "collusion with the purchaser, the court will not interfere "even though the sale be very disadvantageous, unless the "price is so low as in itself to be evidence of fraud. A "mortgagee in exercising his power of sale is not (except as "to the balance of the purchase-money after a sale) a trustee "for the mortgagor even if the mortgage is in the form of "a trust for sale." The passage so often quoted from Kay J.'s judgment in that case is in practically the same terms

(1) (1882) 20 Ch. D. 220.

as the headnote, and includes this sentence (1): "It is a power "given to him [the mortgagee] for his own benefit to enable "him the better to realize his debt."

The next authority—a decision of the Court of Appeal—is the equally well-known case of *Farrar* v. *Farrars, Ld.* (2). The headnote shows that there were three mortgagees in possession of whom Mr. Farrar was one and that he acted as the mortgagees' solicitor in the transaction. The mortgagees sold under the power of sale in their mortgage deed to a company formed to purchase the property. The company was to some extent promoted by Mr. Farrar who became its solicitor and had a substantial interest as a shareholder. It was held, first, that the sale could not be set aside on the simple ground that Mr. Farrar was a shareholder in the company for "a sale "by a person to a corporation of which he is a member is not "either in form or substance a sale by him to himself along "with other people," but it was also held that there was such a conflict of interest and duty in Mr. Farrar, of which the company had notice, as to throw on the company the burden of upholding the sale. It was held further in point of fact that the company had discharged themselves of this burden by showing that Mr. Farrar "had taken all reasonable pains to secure a "purchaser at the best price, and that the price given was "not at the time inadequate, though more might have been "obtained by postponing the sale." A passage in the judgment of Lindley L.J., which I propose to read, states that Mr. Farrar (3): "in no way disregarded his duty to "his mortgagors, on the contrary, he was doing the utmost "in his power to find a purchaser at the best price that "could be got. At this time his interest was to get the best "price he could, for his security was by no means ample, "he was pursuing that interest, and was discharging his "duty at the same time, and he had no conflicting interest "in the matter."

Lindley L.J.'s judgment in another case, *Kennedy* v. *De Trafford* (4) is very often referred to. It contains this illuminating passage (5) "Now upon what ground can the sale be "impeached? The Vice-Chancellor"—that was in the court of first instance in the same case—"begins his judgment by "referring to the cases of *Warner* v. *Jacob* (6) and *Farrar* v.

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(1) 20 Ch. D. 234.

(2) (1888) 40 Ch. D. 395.

(3) Ibid. p. 413.

(4) [1896] 1 Ch. 762.

(5) Ibid. p. 771.

(6) 20 Ch. D. 220.

Farrars, Ld. (1) which contain the principles applicable to " this case, and then he says: ' Now in this case it is not " ' suggested that the mortgagees did not act bona fide; and " ' it is not suggested that there was any corruption or " ' collusion on their part, or that the sale itself was at an " ' undervalue so gross as to be in itself evidence of fraud '." The learned lord justice goes on: " If that is so, and I am " satisfied it is, upon what ground can the sale be set aside? " It is very difficult indeed to see how it can be set aside, but " on an examination of the Vice-Chancellor's judgment I " think I see what led him to set it aside. He was led to do " so—and I think he was a little misled—by some language " which I used in delivering the judgment of the court in " *Farrar* v. *Farrars, Ld.*, where I said this: ' If in exercise " ' of his power he '—that is, the mortgagee—' acts bona " ' fide and takes reasonable precautions to obtain a proper " ' price, the mortgagor has no redress, even although more " ' might have been obtained for the property if the sale " ' had been postponed.' Now, the Vice-Chancellor has come " to the conclusion that reasonable precautions to obtain " a proper price were not used. The reason why these words " were added was this: A mortgagee is not a trustee of a " power of sale for the mortgagor at all; his right is to look " after himself first. But he is not at liberty to look after " his own interests alone, and it is not right, or proper, or " legal for him, either fraudulently, or wilfully, or recklessly, " to sacrifice the property of the mortgagor: that is all. If " it could be said in this case that the mortgagees had done " any of those things, I can understand setting aside the " sale; but when one comes to the facts it appears to me that, " instead of not taking ' reasonable precautions ' in the sense " in which those words are used in *Farrar* v. *Farrars. Ld.* (1), " to obtain a purchaser at a good price for this property, the " mortgagees, through their solicitor, acted from first to last " in an honourable and businesslike manner, without in the " least sacrificing the interests of the mortgagors." That case went to the House of Lords and the headnote which I think sums up the result of the case sufficiently for my present purpose is as follows: (2) " The only obligation incumbent on " a mortgagee selling under and in pursuance of a power of " sale in his mortgage is that he should act in good faith. In " determining whether the mortgagee's conduct in that respect

(1) 40 Ch. D. 395.

(2) [1897] A. C. 180.

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"comes up to the required standard regard must be had to the circumstances of the particular case."

There is one other case to which I should refer, although I do not think it was cited at the Bar, and that is *Belton* v. *Bass, Ratcliffe and Gretton, Ld.* (1). The passage to which I desire to refer is in the judgment of Russell J. (2) and is in these terms: "In *Robertson* v. *Norris* (3) Stuart V.C. cited Lord Eldon as an authority in favour of the principle that the mortgagee is a trustee for the benefit of the mortgagor in the exercise of his power of sale, and added that if he used the power for any purpose other than to secure repayment of the mortgage, to effect other purposes of his own or to serve the purpose of other individuals, that would be a fraud on the exercise of his power, and the sale would be vitiated against the purchaser. Sir George Jessel in the Court of Appeal would have none of this. The case is that of *Nash* v. *Eads* (4). The court consisted of Sir George Jessel M.R. and Cotton and Lush L.JJ. and held that there was no foundation for this proposition. Sir George Jessel said: 'The mortgagee was not a trustee of the power of sale for the mortgagor, and if he was entitled to exercise the power, the court could not look into his motives for so doing. If he had a right to sell on June 1, and he then said, "The mortgagor is a member of an old county family, and I don't wish to turn him out of his property, and will not sell it at present," and then on July 1 he said, "I have had a quarrel with the mortgagor, and he has insulted me; I will show him no more mercy, but will sell him up at once"—if all this was proved, the court could not restrain the mortgagee from exercising his power of sale, except on the terms of payment of the mortgage debt. The court could not look at the mortgagee's motives for exercising his power. Lord Eldon had never said anything of the kind which Stuart V.C. supposed him to have said. The Vice-Chancellor was entirely mistaken, and must have been citing the judgments to which he referred from his recollection, without looking at the reports. Of course, there were some limits to the powers of the mortgagee. He, like a pledgee, must conduct the sale properly, and must sell at a fair value, and he could not sell to himself. But he was not bound to abstain from selling because he

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(1) [1922] 2 Ch. 449.

(2) Ibid. p. 465.

(3) (1858) 1 Giff. 421, 424.

(4) (1880) 25 Sol. J. 95.

" 'was not in urgent want of his money, or because he had " 'a spite against the mortgagor.' " That passage, among others, supports the view which I take that the statement in Fisher and Lightwood about obtaining "the best possible "price" is inaccurate, and that the statements in Halsbury's Laws of England and Coote on Mortgages, that it is the duty of the mortgagee to obtain "a proper price," are accurate.

That being the position of a mortgagee exercising his power of sale, let me contrast briefly the position of the ordinary fiduciary vendor. He, of course, must think of himself not at all. He is acting for the benefit of others. He must use reasonable diligence in the manner of the sale, and, taking the example of a limited owner selling under the Settled Land Act, 1925, there is no doubt that it is his duty to obtain the best consideration in money that can reasonably be obtained.

Many cases illustrate the obligations of a trustee for sale. The headnote of *Grove* v. *Search* (1) reads thus: "A testator "who died in September, 1904, devised and bequeathed his "residuary estate to trustees upon trust for sale with a power "of postponement and upon trust out of the proceeds to pay "his debts, an annuity to his widow, and a yearly sum for "the maintenance and education of his children. Part of "the testator's estate was a freehold house, let to a tenant for "twenty-one years from September 29, 1898, at a yearly "rent of 225*l.*, the lease being determinable at the tenant's "option at the expiration of seven years. The house, which "was subject to a mortgage for 3,500*l.*, was valued for probate "at 4,100*l.*, the trustees having accepted that valuation from "the beneficiaries' solicitor, who had some knowledge of "property in the district. In January, 1905, the trustees, on "the advice of a firm of auctioneers and estate agents, whose "manager, though not a qualified valuer, had viewed and "reported on the house, offered to sell the house to the tenant "for 4,000*l.*, but this offer, as well as another to sell for 3,700*l.*, "was refused by the tenant, who, however, offered to purchase "it for 3,000*l.* The trustees, who had heard that the tenant "was likely to exercise his option to determine the lease, and "had obtained a further report that the property had considerably deteriorated in value since the date of the lease, "agreed, after taking the advice of counsel, to accept the "tenant's offer, and a contract was entered into in February,

(1) (1906) 22 T. L. R. 290.

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"1905. *Held*, in an action by the beneficiaries, who impeached "the contract on the ground that the price was grossly "inadequate"—it will be remembered that it was 500*l.* less than the mortgagee's debt and 1,100*l.* less than the probate valuation—"and that the trustees had not taken steps to "ascertain the best price obtainable for the property, and "that the trustees had not informed them of the existence of "the negotiations, that there was no obligation to consult "the beneficiaries' solicitor, and that the trustees having "acted on the advice of a firm of high reputation and there "being no evidence that there was any market for such a house "at a higher price or at any price, the contract could not be "impeached." Kekewich J., after stating the facts, said that the question to be decided was stated by Mellish L.J. (quoting from Turner L.J. in *Rede* v. *Oakes*) (1), in *Dance* v. *Goldingham* (2) as follows: "The true question on which the "validity of such a sale must depend seems to me to be this:— "Was or was not the sale made under such circumstances and in "such a manner as that the cestuis que trustent ought to be "held bound by it? If it was, the title of the purchaser could "not, I conceive, be impeached. If it was not, his title would, "I apprehend, be liable to impeachment at the suit of the "cestuis que trustent." Kekewich J. continues: "It was "said that this sale ought to be impeached on two grounds— "first, undue haste; secondly, improvidence. As to the "first ground, it was true that little time had elapsed between "the testator's death and the realization. The trustees "thought they ought to sell at once. There was a direct "trust for sale, followed, no doubt, by a power of postponement. According to his lordship's experience in chambers, "when a trust was in this form it was very seldom for the "advantage of the trust estate that the sale should be postponed. It was usually better that the sale should take place "as soon as was reasonably possible. Looking at all the "circumstances of this case, his lordship came to the conclusion that the trustees were quite right in desiring to "realize the testator's estate as quickly as possible." The learned judge then refers to there being a lease and says: "In those circumstances it was impossible for the trustees "to sell the house properly except to the tenant himself, "since they could not know whether the notice to determine "would be given or not, but that consideration did not apply

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(1) (1864) 4 De G. J. & S. 505, 513.

(2) (1873) L. R. 8 Ch. 902.

" in the least to a sale to the tenant; and his lordship saw " no evidence of any undue haste on the part of the trustees. " Then, as to improvidence. No doubt the trustees were " bound to get the best price they reasonably could for their " cestuis que trustent. What improvidence was there here? " It was said that the trustees had consulted the solicitors of " the beneficiaries as to the value of this property for probate, " and had accepted the valuation of the solicitors, and that " they did not consult them again with reference to the sale; " but in his lordship's opinion there was no obligation on the " trustees to communicate with the solicitors of the beneficiaries " at all. Then it was said that the trustees never had a " valuation of the property made at the time. What they " did was to instruct Messrs. Debenham & Tewson not to " sell, but to report with a view to a sale." After referring to a report on the house which the trustees had obtained Kekewich J. goes on: " When the offer of the 3,000*l.* was " made the trustees at first would have nothing to do with it, " seeing that the property was mortgaged for 3,500*l.* and was " valued for probate at 4,100*l.*, and they refused to consider " the matter unless they had a report in writing under the " signature of the firm. That report was duly written and " signed by the firm, and the trustees acted upon it. There " was some evidence at the trial "—and this seems to me to be of importance—" that a little more might have been got " for the property, but evidence of that kind ought always to " be accepted with a large pinch of salt. There was certainly " a depression in the market at the time of the sale, and that " weighed very much with Debenham & Tewson. His " Lordship was not convinced on the evidence that there was " any market for a house of this kind at a large price or at " any price, and it might have been in the market at the " present moment. Suppose the trustees had taken a different " course, and had not accepted the offer, and had taken the " risk of Griffin [the tenant-purchaser] keeping on the lease, " in his Lordship's opinion they would have acted very " culpably. Of course, they might have taken another " opinion, but they were advised by a firm of a very high " reputation, and he did not think it necessary that they " should take another opinion. He had no reason to doubt " that Messrs. Debenham gave good advice, notwithstanding " that the price was 500*l.* less than the mortgage debt, and " more than 1,000*l.* less than the probate valuation. The "most that could be said against the trustees was that they "had committed an error of judgment, but he was not "convinced even of that. Taking the test laid down by "Mellish L.J., it would be wrong to impeach this contract. "Mr. Griffin was therefore entitled to specific performance, "and the trustees must be kept harmless at the expense of "the trust estate."

That case is not without some analogy to the present case and I come now to the third question that I propounded to myself: What is the measure of responsibility which lies on the building society as mortgagee? Is it that which lies on the ordinary mortgagee? Is it that which lies on the ordinary fiduciary vendor? Or is it some other, and if so what, measure? I have come to the conclusion that the obligation which lies on a building society mortgagee selling under its power of sale is similar to that of a fiduciary vendor. I think that s. 10 of the Act of 1939 was intended to add the building society mortgagee to the class of persons who are counted as fiduciary vendors. That, however, must be qualified in three ways. First, it is obvious when one examines the position that a building society mortgagee when it sells may consult its own convenience as regards the time of sale. I cannot get from this section any indication that there is a duty on a building society mortgagee to "nurse" the property. Having once made up its mind that it desires to realize its security it is in exactly the same position as that of a trustee vendor under an obligation to effect a sale at once. Secondly, the statement must be qualified by reference to s. 101 of the Law of Property Act, 1925, which gives to a mortgagee a very wide discretion regarding the mode of a sale, that is to say, the mortgagee may sell the mortgaged property either as a whole or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he thinks fit, with power to vary any contract for sale, to buy in or to rescind contracts, and so forth. I cannot take the view that s. 10 of the Building Societies Act, 1939, has made that section of no effect so far as building society mortgages are concerned. Even more important, is a third qualification which must be put on this matter, and that is to be found in s. 106 of the Law of Property Act, 1925. Sub-section 3 of that section provides: "The mortgagee shall "not be answerable for any involuntary loss happening in or "about the exercise or execution of the power of sale conferred "by this Act, or of any trust connected therewith, or, where "the mortgage is executed after December 31, 1911, of any "power or provision contained in the mortgage deed." The building society mortgagee has the benefit of the protection extended to mortgagees by that sub-section.

In the present case several facts seem to be abundantly clear. This was a troublesome property to deal with and I do not think I am doing the defendant an injustice when I say that he was a troublesome customer of the building society. He was difficult to get hold of and difficult to get money out of. The property was undoubtedly in a bad state of repair. The exact steps which the building society took to get a purchaser were, no doubt, rather few, but all that s. 10 of the Act of 1939 provides is that the building society shall "take reasonable "care to ensure that the price is the best price which can "reasonably be obtained." The word "ensure" has puzzled me a good deal. I think it is used in the common and colloquial sense in which "making sure" is used, that is, as equivalent to ascertaining or satisfying oneself, and does not mean anything in the nature of warranty or guarantee. I think that the "reasonable care" which has to be taken is to make sure, to assure oneself, that the price at which the estate is proposed to be sold is the best price which can reasonably be obtained. Taking as a postulate in the present case that a sale had to be effected in December, 1942, did the society through its officer satisfy itself that at that moment no better price was available? With a certain amount of hesitation I have come to the conclusion that the society did just fulfil its obligations under the section. I am not altogether satisfied with the way in which the society has dealt with this matter, and, in particular, I think that they ought to have kept a much more careful record of the various steps which they took in regard to it. I think there should have been a properly documented file to show exactly how they were, during the period following their entry into possession, endeavouring or intending to carry out their duties under this section. In my view, a building society must now take in this connexion as much care as a trustee has always had to take in relation to trust property, so that, just as when a trustee is challenged by the bèneficiary to account for what he has done, so I think a building society must be prepared, when challenged by the mortgagor, to show exact particulars of the care which he has taken to make sure that the price which has

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been obtained for the property is a price on which no advance was available at the moment. Section 10 places a society under a peculiar position of obligation towards the mortgagor, and the attitude which could be taken up by the ordinary mortgagee of saying: "I have sold at a proper price. I have "got my money and there is an end to it" is not the sort of attitude which can in future be taken up by a building society. In my view, the statement that the mortgagee in ordinary circumstances must obtain, not the best, but a proper, price, has now been varied in the case of a building society by reference in this section to the "best price."

I think that justice will be done in the circumstances by giving the building society judgment for the amount which they claim, but without costs.

Judgment for plaintiffs.

Solicitors: *Shaen, Roscoe & Co.*; *Beardall, Fenton & Co.*

H. L. L.

UTHWATT J.

1944

May 4.

In re PALMER: NATIONAL PROVINCIAL BANK *v.* BARWELL.

Will—Ademption—Bequest of "stocks and shares . . . . in care, "custody or possession" of bank—Mandate to pay interest to account of testatrix at bank—Order in lunacy—Receiver appointed—Transfer of stocks into court.

A testatrix, who was the owner of two sums of conversion stock and consolidated stock inscribed in her name in the Bank of England, had given a mandate to the bank to pay all the interest on the stocks to her account at Grindlay's Bank. By her will, made in 1939, she gave all stocks, shares and moneys which should at her death be standing in her name or at her disposal and were "in the care custody or possession of Grindlay's Bank" to her nephews living at her death. After the date of her will, an order was made under s. 116 of the Lunacy Act, 1890, appointing a receiver of her estate and the stocks in question were ordered to be transferred into court. A summons was taken out by the trustees asking whether the stocks passed to the two nephews of the testatrix living at her death or fell into residue:—

Held, that, on the true construction of the will, the stocks in question were not in the testatrix's name nor "in the care custody "or possession of Grindlay's Bank" at any material time, that no question of ademption or temporary removal arose, and, therefore, they passed under the residuary bequest.

ADJOURNED summons.

By cl. 4 of her will, dated September 14, 1939, the testatrix, Miss Frances Foster Palmer, made the following bequest: "I bequeath all such stocks shares moneys and things as shall "at my death be standing in my name or at my disposal "and be in the care custody or possession of Grindlay's Bank, "Ld. of Parliament Street London S.W.1 to such of them "my nephews as shall be living at my death and if more than "one of them shall be so living as tenants in common in "equal shares." On March 6, 1941, an order was made under s. 116 of the Lunacy Act, 1890, appointing a receiver of the testatrix's estate, on the ground that through age and mental infirmity she was unable to manage her affairs. Immediately before the date of that order the testatrix was the owner of 2,000*l.* 3½ per cent. conversion stock, and 1,000*l.* 4 per cent. consolidated stock inscribed in her name. She had given a mandate to the Bank of England to pay all the interest on these stocks into her account at Grindlay's Bank. This mandate had been acted on for some time. On the making of the order under the Lunacy Act the testatrix's will was brought to the attention of the master, and he, acting under powers vested in him by the Lunacy Acts, 1890 and 1891, made certain orders to preserve so far as possible the administration of the property of the lunatic as regards the tenure and the devolution of her property, but no such order was made regarding the two stocks mentioned with a view to preserving such rights as there might be existing under cl. 4 of the will. The stocks were ordered to be transferrred into court. The testatrix died on July 12, 1941, and her will was proved. This summons was taken out by the plaintiffs as trustees of the will asking whether, on the true construction of cl. 4 of the will and in the events which had happened, (*a*) the defendants, Alan Harold Barwell, and Claude Foster Barwell, nephews of the testatrix, were entitled as tenants in equal shares to the stocks mentioned, or (*b*) the stocks formed part of the residuary estate of the testatrix.

W. G. H. Cook for the trustees.

Fawell for the nephews. The testatrix had a deposit account at Grindlay's Bank at the date of her will and had given a mandate to the Bank of England for the payment of interest on the inscribed stocks into her account. The stocks, therefore, come within the description in the will, and were not adeemed by transfer into court after the order under the Lunacy Act was made. *In re Wood* (1) is precisely in point. No transfer into the name of the Accountant-General affects the beneficial ownership on the subject of transfer. The removal must be ignored altogether. *Chapman* v. *Hart* (2); *In re Lea* (3); *In re Johnston* (4); *In re Baroness Zouche* (5); Jarman on Wills, 7th ed., vol. II., p. 1063. The testatrix referred to the location at Grindlay's Bank so as definitely to identify the stocks she intended to give to her nephews.

J. A. Wolfe for a residuary legatee supported this argument.

Michael Bowles for other residuary legatees. The question is simply one of construction. These stocks were not in the "care custody or possession" of the bank. The mandate to pay interest does not bring them within that description. No question of ademption arises: *In re Freer* (6); *In re Walker* (7); *Browne* v. *Groombridge* (8).

Myles for another residuary legatee adopted this argument.

UTHWATT J. (after stating the facts). The question which I have to decide is whether, assuming that Grindlay's Bank had continued to possess the mandate up to the date of the death of the testatrix, and assuming that the possession of that mandate would be sufficient to bring the stocks within the ambit of the phrase: "in the care custody or possession "of Grindlay's Bank," that is to say, assuming that the clause would have operated on these stocks but for the order in lunacy, on the facts of the case as they now stand there was an effective disposition of these two stocks in favour of the legatees.

The first observation I wish to make is that there is no question of the ademption of anything here by any action of the testatrix. Leaving aside the particular complications of the case there cannot be ademption because the date of the death is under the terms of the will the date at which the contents of the gift are to be determined. The realization of that fact lies at the root of any conclusion to which one may come on the effect of the will.

The only question is: What stocks fall within this description and how do matters stand at the date of the testatrix's death?

(1) [1894] 2 Ch. 577.
(2) (1749) 1 Ves. Sen. 271.
(3) (1911) 104 L. T. 253.
(4) (1884) 26 Ch. D. 538.
(5) [1919] 2 Ch. 178.
(6) (1882) 22 Ch. D. 622.
(7) [1921] 2 Ch. 63.
(8) (1819) 4 Madd. 495.

The proceedings in lunacy and the fact that an order was made under s. 116 can be entirely disregarded. There are indeed certain provisions in the Lunacy Acts relating to the conversion of the property of lunatics. The provision in the Lunacy Act, 1853, was to the effect that the proceeds of land should, notwithstanding its conversion, preserve the character of land and belong to the same persons as would have been entitled to the land if there had been no conversion. This has been replaced by s. 123 of the Lunacy Act, 1890. That section of the Lunacy Act, 1890, as Russell J. pointed out, in *In re Walker* (1), extended to all classes of property the protection which had been given by the prior legislation to land, but, subject to the operation of that section, the old law, as stated by Chitty J. in *In re Freer* (2) still prevails, namely, that the fact of lunacy does not result in any particular rule of law being applicable in determining the effect of the will of a lunatic.

That being the position stated by Chitty J. in *In re Freer* (2), and accepted by Russell J. in *In re Walker* (1), I approach this matter merely as a question of the proper construction of this gift " I bequeath all such stocks shares moneys and " things as shall at my death be standing in my name or at " my disposal and be in the care custody or possession of " Grindlay's Bank Ld . . . ." I can see no reason for extending that phrase to include stocks which were not in the testatrix's name, although they were, to a certain extent, at her disposal, and which were not in the " care custody or " possession " of Grindlay's Bank Ld. in any form or shape.

I have listened to an elaborate and ingenious argument by Mr. Fawell to the effect that there is some supposed general principle of ademption applicable to the case. He founded the allegation of that principle on the cases which deal with the disposition of chattels at a certain place when those chattels did not, in fact, happen to be at that place at the date of the testator's death or at any other relevant date. It was suggested that there was a general principle that the temporary removal from a particular place did not operate as an ademption of a gift of articles at that place. Mr. Fawell may take comfort from the fact that by certain decisions on that class of case the matter has been dealt with on the footing that there is no ademption. For myself, I do not think that that is an accurate way of stating it. The whole question always is

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(1) [1921] 2 Ch. 63.

(2) 22 Ch. D. 622.

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whether the gift comes within the description. As a matter of construction of the gift it is possible in many circumstances—particularly in the case of articles which are described as articles at a particular place and which have been removed from that place for temporary purposes—to come rationally to the conclusion that the articles are still at the place described in every real sense of the word although momentarily they are placed at some other spot, such as a bank for safe custody or in the hands of a tradesman for repair. In this case one cannot say that. The Paymaster had no connexion with Grindlay's Bank. Once the stocks had been transferred into court there was not a temporary removal, but a permanent removal. The stocks would remain in court until transferred out of court pursuant to an order, and if that were done, the former mandate possessed by Grindlay's Bank would not be revived. The disassociation with Grindlay's Bank was complete. I, therefore, hold that neither of these stocks passed to the nephews.

Solicitors: *Williamson, Hill & Co., for Page, Gulliford & Gregory, Southampton; Lovell, Son & Pitfield, for Pitfield & Oglethorpe, Petworth.*

H. L. L.

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June 13, 14.

In re COMPTON, DECD.

POWELL *v.* COMPTON AND OTHERS.

Charity—Charitable bequest—Trust for education of descendants of three named persons—Twenty-eight beneficiaries living.

A testatrix by her will provided: " . . . . the money . . . . " is to be . . . . invested . . . . under a trust for ever . . . . " for the education of C. and P. and M. children but C. and P. " children are to have the preference as scholarships for the " time thought best by the trustees not over the age of twenty-six " years. It is not to be used as a pension or income for any one " and is to be held as scholarships at the pleasure of the trustees. " It is to be used to fit the children to be servants of God serving " the nation not as students for research of any kind . . . ." She defined C., P. and M. children as " the lawful descendants " of three named persons. At the date of this summons there were living twenty-eight descendants of those persons under twenty-six years old:—

Held, that the trust was a valid charitable trust.

White v. *White* (1802) 7 Ves. 423; *Attorney-General* v. *Price* (1810) 17 Ves. 371; *Attorney-General* v. *Duke of Northumberland* (1877) 7 Ch. D. 745, and *Attorney-General* v. *Sidney Sussex College* (1869) L. R. 4 Ch. 722, followed.

In re McEnery (1941) I. R. 323, not followed.

ADJOURNED summons.

By her will, dated May 29, 1906, a testatrix provided, inter alia: " . . . . the money [describing it] is to be . . . . invested " under a trust for ever . . . . for the education of Compton " and Powell and Montagu children but Compton and Powell " children are to have the preference as scholarships for the " time thought best by the trustees not over the age of " twenty-six years. It is not to be used as a pension or income " for any one and is to be held as scholarships at the pleasure " of the trustees. It is to be used to fit the children to be " servants of God serving the nation not as students for " research of any kind . . . . Compton children are the lawful " descendants of H. C. Compton . . . . Powell chidn. (*sic*) " are the lawful descendants of Weyland Powell . . . . and " Montagu children the lawful descendants of William Earl of " Sandwich father of the Earl of Sandwich hereinbefore " mentioned . . . ." The testatrix died on November 14, 1941. At the date of this summons, November 12, 1943, there were living ten Compton, six Powell and twelve Montagu children, all less than twenty-six years old. By this summons the surviving personal representative of the testatrix asked, inter alia, whether the trust was a valid charitable trust or was void for perpetuity or uncertainty or was valid for any and what period.

N. Armitage for the personal representative.

Gray K.C. and *Burnett-Hall* for the next of kin. This is not a good charitable trust. To come within any of the four divisions enumerated by Lord Macnaghten in *Commissioners of Income Tax* v. *Pemsel* (1) a trust must contain some element of public benefit, which this gift does not. If this gift was an absolute gift to a recognized educational institution, subject to carrying out these trusts, it would be good: *Attorney-General* v. *Sidney Sussex College* (2); *In re Lavelle* (3). It is, however, merely a limited gift for the education of members of these three families, and is not wide enough to be charitable;

(1) [1891] A. C. 531, 583.
(2) (1869) L. R. 4 Ch. 722.
(3) (1914) 1 I. R. 194.

Laverty v. *Laverty* (1). *In re McEnery* (2). In the latter case, Gavan Duffy J. emphasized the essentially public character of charitable purposes, and held that a bequest of the income of a trust fund to be applied to enable sons and daughters and male descendants of the testator's brothers to obtain professions was too narrow to be charitable. True, a trust for the education of the children of employees of a limited company has been held to be charitable: *In re Rayner* (3), but in that case Eve J. held that the gift was for an object within the Statute of Elizabeth, and said that there was an element present which was lacking in *In re Drummond* (4), where he had held that a gift as contribution to the holiday expenses of workpeople employed by a company was not for general public purposes, but for private individuals who could not properly be regarded as "poor people" within the Statute of Elizabeth, and was, therefore, not charitable. *In re Rayner* (3) was very different from the present case. There, the class was held to be large enough for the gift to be charitable. Here it is not large enough, and it certainly is not a section of the public. The testatrix's whole object was to benefit, not the public, but her relations for whom she had affection.

Harman K. C. and *H. E. Salt* for the objects of the trust. This trust comes under "advancement of education" in the four heads enumerated by Lord Macnaghten in *Commissioners of Income Tax* v. *Pemsel* (5), and it is, therefore, a good charitable trust. It cannot matter that, in the cases on education, the gifts went to places of education. Cases like *Attorney-General* v. *Sidney Sussex College* (6) can be supported on the ground that the college took the gift beneficially, subject to the duty of educating such relations of the testator as presented themselves there. Tudor on Charities, 5th ed., p. 118; Halsbury's Laws of England, 2nd ed., vol. IV, p. 117, para. 154. *In re Lavelle* (7) is a similar authority in favour of the objects of this trust. The present case is not like *Laverty* v. *Laverty* (1) where there was merely a trust to educate and support people of a particular name. In *In re McEnery* (2) Gavan Duffy J.'s view that a charitable trust must be for the benefit of the public, in the sense of a wide section of the community, was wrong. If the trust in the present case was for the poor relations of the testatrix, and, therefore, for the relief of poverty, no one would suggest that it was not charitable because it was not for the relief of the public: *White* v. *White* (1), where a bequest for poor relations was confined to two families. [*Mocatta* v. *Lousado* (2); *Attorney-General* v. *Price* (3); *Attorney-General* v. *Duke of Northumberland* (4); Tudor on Charities, 5th ed., pp. 26, 27, were referred to.] *In re Rayner* (5) goes a very long way in favour of the objects of the trusts in the present case. Presumably, the element which Eve J. there referred to as lacking in *In re Drummond* (6) was the sufficient definition of the class, and that element is present in the present case. The testatrix has chosen three stocks in which she was interested. There are twenty-eight members of all three stocks together, and the number may well increase. The object of the trust is a good charitable object, and the chance that the class may finally fail altogether cannot weigh with the court.

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(1) [1907] 1 I. R. 9.
(2) [1941] I. R. 323.
(3) (1920) 122 L. T. 577.
(4) [1914] 2 Ch. 90.
(5) [1891] A. C. 531.
(6) L. R. 4 Ch. 722.
(7) [1914] 1 I. R. 194.

Danckwerts for the Attorney-General. This is a good charitable trust, because it is for the advancement of education and is for a class which is a portion of the public and may well increase, although there are at present only twenty-eight members. Also, the fact that the money is " to be held as " scholarships " shows that those benefiting under the trust are to go to some place of education. A gift to Winchester College on trust to apply the income to paying the whole or part of the expenses of the education there of boys answering a particular description was held by Bennett J. to constitute a good charitable trust: *In re Wilson-Barkworth* (7).

Gray K.C. in reply. The trust in the present case does not pass the test laid down in *Verge* v. *Somerville* (8) of being for the benefit of the community or of an appreciably important class of the community. It was easier to hold that there was a good charitable trust in *Mocatta* v. *Lousado* (9) than it is here, for " a large number of Jews " is certainly a part of the public and a particular class, whereas the members of two families are not. No reported authority suggests that members of individual families can be a section of the community within *Commissioners of Income Tax* v. *Pemsel* (10). Of the other

(1) (1802) 7 Ves. 423.
(2) Unreported.
(3) (1810) 17 Ves. 371.
(4) (1877) 7 Ch. D. 745.
(5) 122 L. T. 577.
(6) [1914] 2 Ch. 90.
(7) Unreported. November 23, 1933.
(8) [1924] A. C. 496, 499.
(9) Unreported: see 7 Ves. 423.
(10) [1891] A. C. 531.

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cases, the only one in favour of the objects of this trust is *Attorney-General* v. *Price* (1).

Cohen J. Mr. Gray argues that in all four headings which are stated by Lord Macnaghten in *Commissioners of Income Tax* v. *Pemsel* (2) there must be a public element and that this trust can be upheld only if the trustees are an educational establishment and the court can infer a dominant motive to promote education through that educational establishment although it may be linked with and subject to a condition that the beneficiaries first to be considered are to be relations of the testatrix. I confess that, had the matter been free from authority, I should have been inclined to uphold Mr. Gray's argument and to hold that in this trust there is a dominant intention to promote, not education, but the education of members of a limited class. I think, however, that I am bound by authority to hold that this trust for the education of the descendants of three families (including, as they do now and probably did at the testatrix's death, twenty-eight descendants) is wide enough to constitute a valid educational trust.

Mr. Harman called my attention to a number of cases dealing with the question of poor relations, and he said that, just as it has been held that a trust for relieving the poverty of the relations of a testatrix or of the members of one or of two families is upheld as a public trust, so it must follow that a trust is not prevented from being a valid charitable trust merely because the educational purpose is expressed in relation to a comparatively narrow group such as the three families in the present case. In *White* v. *White* (3) the testatrix had bequeathed a personal fund, consisting of about 3,000*l.* stock, to put out " our poor relations " as apprentices. Afterwards, by a codicil, she confined the gift to two families. The Master of the Rolls (Sir William Grant) said : " Are not such cases " supported as charities ? There was a case of this kind, " *Mocatta* v. *Lousado* (4), lately before me ; where a great " number of Jews were the objects. I may execute it as far " as I can. I do not know why those, who are ready, may " not be put out apprentices." Mr. Gray says that *Mocatta* v. *Lousado* (4) is distinguishable because a large number of Jews could more easily form a particular class of the community than poor members of two families. In *Attorney-General* v.

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(1) 17 Ves. 371.

(2) [1891] A. C. 531, 583.

(3) 7 Ves. 423.

(4) Unreported.

Price (1), there was a devise to A. and his heirs, with a direction that yearly he and his heirs should for ever divide and distribute according to his and their discretion among the testator's poor kinsmen and kinswomen and their offspring and issue dwelling within the county of B. 20*l.* by the year. The Master of the Rolls (again Sir William Grant) said (2): "This appears to me to be in the nature of a charitable "bequest." After referring to *Isaac* v. *De Friez* (3) he went on: "This seems to be just as much in the nature of a charitable "bequest as that. It is to have perpetual continuance, in "favour of a particular description of poor; and is not like an "immediate bequest of a sum to be distributed among poor "relations." Finally, in *Attorney-General* v. *Duke of Northumberland* (4), a charitable bequest which had been constituted in 1627 was recognized as valid. It was: "I give and devise for "the relief and use of the poorest of my kindred, such as are not "able to work for their living, videlicet, sick, aged, and impotent "persons, and such as cannot maintain their own charge, "the sum of 1,000*l.*" Later on the will proceeds: "And my "will and meaning is, that in the bestowing and distributing "of my estate and goods to the poor charitable uses, which is, "according to my intent and desire, those of my kindred "which are poor, aged, impotent, or any other way unable to "help themselves, shall be chiefly preferred and respected." That case is not as much help to me as it would otherwise be, because, in his judgment, Sir George Jessel M.R., interprets it as containing a general charitable intent and not merely as a bequest in favour of his relations. He says (5): "It seems to "me that what the testator means is that all his poor kindred "who are unable to get a living, unable to work for their "living because they are sick, aged, or impotent persons, or "cannot otherwise maintain themselves, are to be provided "for. That is the first charge. But, subject to that, I think "the testator does shew, under the word 'preferred,' an "intention—reading the words 'to the poor charitable uses' "to mean 'to charitable uses for the poor'—that the whole "of the property should be devoted to charitable uses for the "poor, subject to the direction as to preference which I have "mentioned. That, I think, is the meaning of the will." There is nothing in the judgment to show that, in his view, the gift would have been bad if it had not been so confined. I think that the inference to be drawn from those cases is that over a series of years the courts have held that a gift in trust for poor relations is a valid charitable gift.

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(1) 17 Ves. 371.
(2) Ibid. 373, 374.
(3) (1754) Amb. 595.
(4) 7 Ch. D. 745, 746.
(5) Ibid. 752.

Mr. Gray next comments—and it is a forceful comment—that there is a difference between cases of poverty and cases of education because in the nature of things relief of poverty, even though among a limited class, necessarily operates for the benefit of the community as a whole and particularly of the community of the district where the relief is felt. I think however, that when one considers the cases on education, one finds in fact that a similar principle has been applied there. The first of them to which I will refer is *Attorney-General* v. *Sidney Sussex College* (1). The headnote is: " A testator, in " 1641, gave lands to Sidney Sussex College, Cambridge, and " Trinity College, Oxford, for the only use, education in piety " and learning, of ten descendants of the brothers and sisters " of the testator and of his two wives, and in default of such, " to their poor kindred. The two colleges accepted the gift, " and each had always required that those persons who " claimed the benefit thereof should become members of the " college, and be educated there, and when there were no such " claimants, each college had appropriated a moiety of the " rents to their own purposes:—Held, upon the construction " of the will, that any descendants claiming the benefit of " the gift must become members of one of the colleges, " and be educated there, and that, subject to that trust, the " colleges were entitled to the lands in equal moieties: Held, " also, that if the construction of the will had been " doubtful, the contemporaneous usage might be referred to, " and that the court would not assume a long series of breaches " of trust to have been committed." That decision of Lord Hatherley L.C. is not in any way against Mr. Gray's argument, because it was held that the gift was to the colleges subject only to an obligation to allow any descendant claiming the benefit of the gift to become a member of one of the colleges, but in the court below Sir John Romilly M.R. declared (2) that the term " descendants " included females as well as males, and was not confined to persons of an age to receive education at either of the said colleges, and declared that, in default of such persons being in existence and being so selected and educated as aforesaid, the poor kindred of the testator's

(1) L. R. 4 Ch. 722.

(2) Ibid. 727.

wives were entitled to the gifts of the testator for their own absolute use and benefit. That decision necessarily involves the view that a trust of which the colleges were merely trustees for the education in piety and learning of ten descendants of the brothers and sisters of the testator and his two wives was a valid charitable trust and that the gift did not create a scholarship at the colleges, or, indeed, anywhere. Obviously the gift was not limited to a scholarship at the colleges named, because it included females as well as males. On appeal, the Lord Chancellor did not have to decide that point, but it is to be observed that it was not argued that the gift was void because the class of persons to be educated was limited to " descendants " of named persons. It was argued that a gift for the benefit of descendants and not for the benefit of education was not a valid charitable gift. There is no indication anywhere that a gift for the education of descendants would have been held to be invalid. On the whole I think that I am bound by those decisions to uphold the gift in this case.

My attention was called to a number of Irish cases. Mr. Harman relied to some extent on *In re Lavelle* (1). There the bequest of 600*l.* was to St. Jarlath's College, Tuam, and the interest on the money was to go for ever towards the education of the testator's relations in that college, preference to be given to the most eligible and best conducted, the selection to be given to the archbishop for the time being, a conscientious layman and the parish priest of the boy to be considered. It appears to have been upheld on the view that the testator intended to make the gift to the college merely subject to the obligation to receive at all times one relative of the testator so that there was clearly an intention to benefit education through the particular college. I do not think, therefore, that that case carries the matter any further than *Attorney-General* v. *Sidney Sussex College* (2). The other two cases on which Mr. Gray relied were against Mr. Harman's argument. The first was *Laverty* v. *Laverty* (3), where the trust was " to pay towards the support and education in Ireland " of any Roman Catholic boy or boys, man or men, of the " surname of O'Laverty or Laverty, O'Lafferty or Lafferty, " being between the ages of eleven years complete and twenty-" three years complete until such boy or man shall have

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(1) [1914] 1 I. R. 194.
(2) L. R. 4 Ch. 722.
(3) [1907] 1 I. R. 9.

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"obtained a trade or profession such sums as said trustees "may think proper." The headnote proceeds: "Absolute "discretion was given to the trustees as to the selection of "recipients and the discontinuance of any payment to them "for their 'support or education.' They were also em-"powered to accumulate and invest the interest the profits "of which were to be applied 'in the same manner as those "'of the original shares or funds, namely, for the support of "'boys or men of the above mentioned surnames under the "'circumstances before mentioned. *Held*, that the gift was "'not charitable and therefore failed'." Barton J. decided the case on two grounds. First, he visualized the possibility under the trust of the trustees carrying out the trust by employing a governess or tutor for some wealthy young Laverty, and such a purpose could not be regarded as charitable. The main ground of his decision, however, which, I think, clearly justifies the conclusion which he reached, was that the trust was not merely to educate, but was for "support and "education" originally, and in a certain event for the support and education of the suggested beneficiaries, and that the support of those persons named was clearly not a general charitable bequest. I do not think that the first ground has any bearing on the facts of the present case because, under the trusts of the will of the testatrix, the money has to be held "as "scholarships at the pleasure of the trustees," and I do not think that the power to give scholarships would enable the trustees to employ a governess or tutor for some wealthy young Compton, Powell or Montagu.

Finally, Mr. Gray relied on *In re McEnery* (1) where the testator directed that moneys then invested "shall be regarded "as a trust fund for enabling the sons and daughters and male "descendants of my brothers to obtain professions, each "suitable student to receive 100*l.* yearly for a reasonable time "from the dividends arising from the said trust fund." Gavan Duffy J., in a lengthy judgment, stresses the point that the courts of equity have been consistently insistent on the public character of legal charity, and he says: (2) "In a search for "precedent upon which, by judge-made law, to establish the "testator's bounty here as an educational charity reliance "was placed in particular upon such cases as *Spencer* v. *All "Souls College* (3), *Attorney-General* v. *Sidney Sussex College* (4),

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(1) [1941] I. R. 323.

(2) Ibid. 327.

(3) (1762) Wilmot's Notes of Opinions, 163.

(4) L. R. 4 Ch. 722.

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" and *In re Lavelle* (1), decisions showing that the founder of " a charity or a benefactor may lawfully associate his " descendants with his bequest to a charitable institution " and thus enable them to participate in his liberality : those " cases find their prototype in *Griffith Flood's case* (2) where " it was laid down that the Act of Elizabeth overriding the " law of mortmain allowed a man to make a devise to a college " at Oxford to find a scholar of his blood from time to time. " But they do nothing to validate the very different provisions " of our testator's will. The trust here is, in my opinion, too " narrow to be charitable." As I have said, if the matter had been free from authority I should have agreed with the observations of Gavan Duffy J. which I have just read, but I do not think that the matter is free from authority and I think that the current of authority compels me to hold that the three families mentioned are a sufficiently wide class and that this trust is a valid educational trust. That the intention was educational there is no doubt. It is to be inferred, not only from the direction that the income is not to be used as a pension or income for anyone, and is to be held by the college, but also from the words : " it is to be used to " fit the children to be servants of God serving the nation " not as students for research of any kind." I must, therefore, direct a scheme.

Solicitors : *Lovell, Son & Pitfield, for Nantes, Maunsell & Howard, Bridport* ; *Farrer & Co. ; Royds, Rawstorne & Co. ; Treasury Solicitor.*

K. R. A. H.

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(1) [1914] 1 I. R. 194.

(2) (1616) Hob. 136 ; Duke on Charitable Uses, 1805 ed., 371, 373.

COLEBROOK *v.* WATSON INVESTMENT COMPANY.

VAISEY J.

1944

May 23, 24, 25, 26 ; June 9.

Vendor and purchaser—Contract for sale of land—Prescribed root of title—Sale by mortgagees in 1919 *without leave of court—Waiver of benefit of Courts (Emergency Powers) Act,* 1914*—Courts (Emergency Powers) Act,* 1914 (4 & 5 *Geo.* 5, *c.* 78), *s.* 1, *sub-s.* 1 (*b*).

By a contract made in 1943 a vendor agreed to sell a mansion and grounds to a purchaser. The conditions of sale provided that the title should commence with a conveyance, dated December 5, 1919, by mortgagees in exercise of their power of sale with the consent of the mortgagor. After the expiration of the period limited for delivery of requisitions on title the purchaser took the objection that the sale in 1919 had been effected without any application by the mortgagees for the leave of the court under s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914. The vendor replied that the requirements of the Act could be, and had been, waived. The purchaser refused to complete, and the vendor brought an action to enforce specific performance :—

Held, that although it had been decided in *Bowmaker, Ld.* v. *Tabor* [1941] 2 K. B. 1 and other cases, that s. 1, sub-s. 2 (*a*), of the Courts (Emergency Powers) Act, 1939 (which corresponds to s. 1, sub-s. 1 (*b*), of the Act of 1914), could not be waived, those decisions had not overruled the decision in *In re Sandow, Ld.* [1916] W. N. 262, that s. 1, sub-s. 1, of the Act of 1914 could be waived. The title was, therefore, good, and the vendor was entitled to enforce the contract.

ACTION.

By a contract, dated June 24, 1943, the plaintiff agreed to sell the Fulmer Hall Estate to the defendant company for 13,000*l.*, subject to the Law Society's General Conditions of Sale. The stipulated root of title was a conveyance on sale by mortgagees with the consent of the mortgagor's personal representatives, dated December 5, 1919. After the expiration of the time limited for the delivery of requisitions, the purchasers took the objection that the sale in 1919 had been effected without any application by the mortgagees for the leave of the court under the Courts (Emergency Powers) Act, 1914 (1), then in force, and, therefore, that the sale was invalid and the title bad. The vendor replied that his predecessor in title had waived any right to insist on the requirements of the Act being complied with. The purchasers were not satisfied with this reply and refused to complete, and the vendor brought this action for specific performance of the contract. The purchasers counterclaimed for its rescission.

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(1) By Courts (Emergency Powers) Act, 1914, s. 1, sub-s. 1 : ". . . . no persons shall . . . . " (*b*) . . . . realize any security " . . . for the purpose of enforcing the payment or recovery " of any sum of money . . . . " except after such application to " the court and such notice as " may be provided for by rules " or directions under this " Act . . . ."

By sub-s. 2 : " If on any such " application, the court . . . . is " of opinion that time should be " given to the person liable to " make the payment on the " ground that he is unable immediately to make the payment " by reason of circumstances " attributable . . . . to the " present war, the court may " . . . . by order . . . . defer the " operation of any such remedies " as aforesaid, for such time and " subject to such conditions as the " court thinks fit."

By Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2 : " A " person shall not be entitled, " except with the leave of the " appropriate court,—(*a*) to proceed to exercise any remedy " which is available to him by " way of (iv.) the realization of " any security . . . ."

By sub-s. 4 : " If on any application for such leave . . . . the " appropriate court is of opinion " that the person liable to . . . .

Harman K.C. and *Hillaby* for the vendor. This was a perfect abstract of title, and the requisition being out of time was ineffectual: see *Want* v. *Stalibrass* (1); *Rosenberg* v. *Cook* (2); and *Pryce-Jones* v. *Williams* (3). The fact that no application was made by the mortgagees for the leave of the court to enable them to exercise their power of sale in 1919 is no defect in the title, for the sale was by consent of the mortgagor and the requirements of the Courts (Emergency Powers) Act, 1914, could be waived: *In re Sandow, Ld.* (4), which has been accepted as good law and acted on ever since: see Annual Practice, 1940, p. 2865. It has not been affected by subsequent decisions on the Courts (Emergency Powers) Act, 1939, which is very differently worded. The principle of stare decisis applies. That doctrine is clearly stated in Lord Selborne's judgment in *Great Eastern Ry.* v. *Goldsmid* (5). See also *Equitable Life Assurance Co. of United States* v. *Reed* (6); Halsbury's Laws of England, 2nd ed., vol. XXIII, p. 420; Williams on Vendor and Purchaser, 4th ed., p. 107. Beal's Cardinal Rules of Legal Interpretation, 3rd ed., p. 20 et seq. (which discusses the authorities, one of the best of which is *Pugh* v. *Golden Valley Ry. Co.* (7)). Decisions which have been accepted for many years, on which titles depend, must be treated as good law. The Conveyancing Act, 1881, s. 21, sub-s. 2, provided an additional protection for the vendor. It is now replaced by s. 104, sub-s. 2, of the Law of Property Act, 1925, the language of which is even clearer as to not impeaching the title of a purchaser from a mortgagee. In *Soho Square Syndicate* v.

"pay the . . . . debt . . . . in "question is unable immediately "to do so by reason of circumstances directly or indirectly "attributable to . . . . war . . . . "the court may refuse leave for "the exercise of that . . . . remedy "or give leave therefor subject to "such restrictions and conditions as the court thinks "proper."

(1) (1873) L. R. 8 Ex. 175.
(2) (1881) 8 Q. B. D. 162.
(3) [1902] 2 Ch. 517.
(4) [1916] W. N. 262.
(5) (1884) 9 App. Cas. 927, 939.
(6) [1914] A. C. 587, 595.
(7) (1880) 15 Ch. D. 330, 334.

E. Pollard & Co. (1) Farwell J. decided that the corresponding section in the Courts (Emergency Powers) Act, 1939, could not be waived, but he distinguished the decisions under the Act of 1914 and his judgment does not suggest that they were wrong. That was followed by *Bowmaker, Ld.* v. *Tabor* (2) to the same effect, and this decision was followed by the Court of Appeal in *Smart Bros.* v. *Ross* (3). The House of Lords reversed that decision on the ground that no remedy was being exercised by the owner of the goods, but that did not affect *Bowmaker, Ld.* v. *Tabor* (2). The only decision which suggests that *In re Sandow Ld.* (4) may have been wrong is *Anchor Trust Co.* v. *Bell* (5) which, to that extent, is not in accordance with the other authorities. Even if the vendor were to fail on these points, on the facts the purchasers are bound to accept a possessory title: see *In re Nisbet & Potts' Contract* (6); *In re Atkinson & Horsell's Contract* (7).

Roxburgh K.C. and *Raymond Jennings* for the purchasers. The doctrine of stare decisis does not apply here. It applies only where the case comes before a court which has power to overrule a previous decision. On the doctrine of stare decisis and its limitations the law was fully stated by several members of the court in *Bourne* v. *Keane* (8), and see *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ld.* (9). *In re Sandow Ld.* (4) ought not to be followed. The application in that case was ex parte and no argument is reported, and the decision cannot be reconciled with *Bowmaker, Ld.* v. *Tabor* (2). The question comes down to this: Did the Act of 1914 abrogate a mortgagee's power of sale unless the leave of the court was first obtained, and in *Anchor Trust Co., Ld.* v. *Bell* (10), Lawrence J. held that it did. In *Soho Square Syndicate* v. *E. Pollard & Co.* (1) Farwell J. suggested that there may have been a change in public policy between 1914 and 1939, but all the statements of the House of Lords in *Smart Bros.* v. *Ross* (3) as to the public policy underlying the Act of 1939 apply with equal force to the Act of 1914. An objection may be taken to the root of title, even though the time limited for requisitions has expired. There is no sufficient evidence to prove a possessory title from 1919 to 1934.

(1) [1940] Ch. 638.
(2) [1941] 2 K. B. 1.
(3) [1943] A. C. 84.
(4) [1916] W. N. 262.
(5) [1926] Ch. 805.
(6) [1905] 1 Ch. 391.
(7) [1912] 2 Ch. 1.
(8) [1919] A. C. 858, 871, 914, 922.
(9) [1943] A. C. 32, 44.
(10) [1926] Ch. 805, 822.

Harman K.C., in reply, referred to *Berners* v. *Fleming* (1).

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COLEBROOK v. WATSON INVESTMENT CO.

Cur. adv. vult.

June 9. VAISEY J. read the following judgment. This is a vendor's specific performance action. The questions which arise all originate in what the defendants allege to be an imperfection in the deed which is the stipulated root of the plaintiff's title. This deed is dated December 5, 1919 and purports to be a conveyance in exercise of the mortgagee's power of sale. The mortgagor's personal representative, acting under the direction of the court in proceedings in which the mortgagor's estate was being administered, consented to such exercise of the power, but there was no application to the court in regard thereto under the Courts (Emergency Powers) Act, 1914, which was in operation at the time. The defendants contend that this omission vitiated the deed. Under decisions which bind me there is no doubt that in cases to which the corresponding statute now in force applies, namely, the Courts (Emergency Powers) Act, 1939, it is not competent to interested parties in any way to contract out of its provisions. Thus, the protection which that Act affords to (among others) a mortgagor cannot be waived by him, and an order of the court is the indispensable prerequisite to any exercise of a mortgagee's powers in any case to which that Act applies. If a similar disability was imposed upon the parties by the Act of 1914, the deed of December 5, 1919 did not, it is argued, exercise the power of sale validly or at all, and operated only as a transfer of the mortgage, with the consequence that it is neither such a document as the contract represents it to be nor such a root of title as the vendor can oblige the purchasers to accept. The purchasers ask me to come to that conclusion (1.) by necessary implication from those decisions which bind me under the Act of 1939; (2.) on the principles which those decisions establish or illustrate; and (3.) having regard to *Anchor Trust Co.* v. *Bell* (2), which dealt with the Act of 1914.

To test the validity of the purchasers' arguments I must consider, in the first place, the relevant provisions of the two Acts, with particular reference to the points of similarity and of difference which they present. The Act of 1914 was in force from August 31, 1914, to August 31, 1922, a period of eight years. Compare and contrast the material words of

(1) [1925] Ch. 264.

(2) [1926] Ch. 805.

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s. 1, sub-ss. 1 and 2, of that Act with those of the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2 (*a*), and sub-s. 4. It seems to me that there are some noticeable differences of expression as between the two Acts. In the earlier one, the prescribed condition precedent is the application to the court and the service of a notice. In the later it is the obtaining of the court's leave. What the court is empowered to do by the earlier Act is to defer the operation of a remedy. By the later Act it is either to refuse, or to give, leave for the exercise of the remedy. The last-mentioned distinction is particularly important in connexion with the following observation of Lord Simon L.C. in *Smart Brothers* v. *Ross* (1): " Where the " statute "—that is, the Act of 1939—" requires the leave of " the court before a remedy can be exercised that leave cannot " be dispensed with by agreement between the parties." This principle is much more clearly applicable on the wording of the Act of 1939 than on the different expressions of the Act of 1914. A power to defer the operation of a remedy is not the same thing as the prohibition of its exercise without leave, and, though the result in either case may be much the same, it does look as though the intentions of the legislature were not absolutely identical on the occasions of the passing into law of these two statutes. If they were, it is surely legitimate to inquire why the legislature did not on the second occasion use the same language as had been used on the first occasion.

During the whole of the time while the Act of 1914 was in operation, nobody seems to have seriously supposed that it was not, for example, perfectly legitimate for a mortgagor, at a time when he was entitled to the protection of the Act, to waive such protection, and in this sense to contract out of its provisions. The only reported decision (if such it may be called) on the point is that of Sargant J. in *In re Sandow, Ld.* (2). The authority itself is far from satisfactory. The application was ex parte, and the record of what was said both by counsel and by the learned judge is extremely meagre, but the real importance of the case, to my mind, is that it was treated on all sides as accurately stating the law. The text-books and books of reference were and are, so far as I can discover, unanimous in taking the view that there was no need under the Act for the enforcement of a mortgagee's remedies to be sanctioned by the court, provided that it was

(1) [1943] A. C. 84, 91.

(2) [1916] W. N. 262.

consented to by the mortgagor: see, for example, the Annual Practice, 1920, p. 1336, and all subsequent issues down to (I believe) 1940; Halsbury's Laws of England, 2nd ed., vol. XXIII, p. 420; Williams on Vendor and Purchaser, 4th ed. (1936), p. 107; Palmer's Company Precedents, part III, (Debenture Volume) 1920 ed., pp. 620 and 812. There is no doubt at all that receivers of mortgaged properties were as a common practice during those eight years appointed both by the court and out of court, without any application being made under the Act of 1914, the concurrence or consent of the mortgagor being universally regarded as quite sufficient. If the purchasers' objection in the present case is well-founded, there must have been scores, if not hundreds, of orders of court and transactions out of court which were in fact (although no one appears to have suspected it) absolutely illegal and void. I confess to a feeling that such a decision on my part might savour somewhat of presumption, but that, of course, in no way concludes the matter.

It seems that Atkin J., in *Knowles* v. *Mellor* (1), came to the same conclusion as Sargant J., but, with that exception, nothing seems to have been mooted on the point until some time after the Act had ceased to be in operation when *Anchor Trust Co.* v. *Bell* (2) came before Lawrence J., to whose judgment I must now advert. The learned judge undoubtedly approved of *In re Sandow, Ld.* and obviously thought that "contracting out" of the Act was possible. Indeed, he says so, and a large part of his judgment was devoted to the question whether the parties had, in fact, contracted out of the Act, a question which he decided in the negative. A passage, however, which has caused me some misgiving is where he says (3): "In my opinion the effect of "the Act of 1914 is to abrogate the power, unless the require-"ments of the Act are complied with." How is the word "abrogate" to be reconciled with the rest of the judgment? If the learned judge meant that the power had been abrogated in the proper sense of that word—that is to say, "abolished" or "destroyed"—why did he take such pains to discover whether or not it had been exercised by consent? It would have been quite enough for him to say that the power did not exist. Mr. Roxburgh's suggestion to me was that he may have supposed that the power could be, as it were, re-created at

(1) Unrep. See Annual Practice, 1920, p. 1336, and [1940] Ch. 643.

(2) [1926] Ch. 805.

(3) [1926] Ch. 821.

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Colebrook v. Watson Investment Co.

the volition of the parties, a view which was ruled out as inadmissible in *Bowmaker, Ld.* v. *Tabor* (1). I myself prefer to effect the reconciliation between the two parts of the judgment by supposing that the word "abrogated" was used in it as equivalent in meaning to "suspended" or "in abeyance," and it is in that sense that I read and understand it. However that may be, Lawrence J. used these very plain words (2): "There can, I think, be no doubt that it was competent for "the plaintiffs to waive any application by Mrs. Bell to the "court before entering into possession or selling the property."

No other relevant reported case under the Act of 1914 was brought to my attention or is known to me, and I must now consider the decisions under the Act of 1939. They are three in number. In none of them was *In re Sandow, Ld.* (3) disapproved of as a decision under the Act of 1914, though the principle which it applied to that Act was held not to be applicable to the Act of 1939. I have already mentioned that the Act of 1939 was expressed in very different language. It was also passed in very different circumstances. This was put very forcibly by Farwell J. in the first of the three cases, *Soho Square Syndicate* v. *E. Pollard & Co.* (4), where he pointed out that the policy of the legislature in protecting such persons as mortgagors and debtors even against themselves and in regarding them as persons not fit to be trusted to look after their own interests has advanced considerably since 1914. Mr. Roxburgh submitted that this view of the matter was no longer tenable as having been impliedly overruled by the Court of Appeal in *Bowmaker, Ld.* v. *Tabor* (1), and by the House of Lords in *Smart Brothers* v. *Ross* (5) already mentioned, these being the other two of the three cases on the Act of 1939. I am not convinced that I ought to accept that submission, nor can I assent to Mr. Roxburgh's broad proposition that neither in phraseology nor in purpose can any distinction be drawn between the two Acts. If the Court of Appeal or the House of Lords had intended to pass a general condemnation on the manner in which the earlier Act had been interpreted and administered during the whole eight years of its operation, it would surely have been done in unmistakable language and not left to be discovered by mere surmise and conjecture. Such a decision would have been well within the

(1) [1941] 2 K. B. 1.
(2) [1926] Ch. 822.
(3) [1916] W. N. 262.
(4) [1940] Ch. 638, 643.
(5) [1943] A. C. 84.

competence of the higher courts, but I am far from clear that it is open to me. It is beyond question that the two Acts do differ very widely in phraseology. I do not profess to understand why the legislature thought it right to effect so radical a re-drafting of the Act of 1914 to meet the later and still existing emergency. The fact remains that it was done.

I must now deal briefly with each of the three cases. As regards the *Soho Square* case (1), the actual decision of Farwell J. was that the provisions of the Act of 1939 preclude a mortgagee from appointing a receiver of the mortgaged property without the leave of the court even though the mortgagor has consented to the appointment. The learned judge expressed the view that Lawrence J. in *Anchor Trust Co.* v. *Bell* (2) was following the decision in *In re Sandow, Ld.* (3). As to *Bowmaker, Ld.* v. *Tabor* (4), it was pointed out in the judgment of the Court of Appeal that the case was one of waiver (which was held to be ineffectual) rather than of contracting out. In the present case, though the point is not, in my view, essential to my decision, the consent, given as it was under the direction of the court might perhaps be regarded as in some sense contractual. Finally, there is *Smart Brothers,* v. *Ross* (5). There it was held that no leave under the Act of 1939 was necessary, on the ground that no remedy was being exercised on the determination by mutual agreement of a hire-purchase contract. I have already quoted the words from the Lord Chancellor's speech on which special reliance was, very properly, placed by Mr. Roxburgh. They cannot, in my judgment, conclude the present case.

On the whole, I see no sufficient reason for acceding to the suggestion that I should come to a decision which involves the proposition that the contemporary theory and practice in regard to the Act of 1914 were fundamentally mistaken and wrong. The idea of so belated an enlightenment does not at all attract me. I should be very reluctant to arrogate to this generation ex post facto a greater measure of wisdom on the subject of the Act of 1914 than was vouchsafed to the generation in whose days it was in actual operation. Other words of the legislature in a similar statute—the Act of 1939—have in these other days been interpreted as excluding the possibility of "contracting out." The decisions to that effect are binding on me, and, if I may say so with respect, I agree

(1) (1940) Ch. 638, 643.
(2) (1926) Ch. 822.
(3) (1916) W. N. 262.
(4) [1941] 2 K. B. 1.
(5) [1943] A. C. 84.

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with them. I cannot, however, overlook the fact that in none of them is it said that *In re Sandow, Ld.* (1) was wrongly decided or that the law as laid down in relation to the Act of 1939 must necessarily have been applicable to the Act of 1914. By what they omit to say I regard these decisions as fully justifying my own. If the practice of contracting out under the Act of 1914 had either violated its terms or been contrary to the public policy of the time, how can that fact have possibly managed for eight whole years, not only to elude the vigilance of the court, but also to escape the notice of the whole of the legal profession in those days? I should hesitate a very long time before venturing to assume the existence of so vital a misunderstanding and so wholesale a maladministration of such an important and widely applicable Act of Parliament, all unsuspected by the bar and uncorrected by the bench, and I am relieved to feel that I am not called on to do anything of the kind. In my judgment, the generation which produced the Act of 1914 should be presumed also to have comprehended its meaning in this very material respect.

Such being the view which I have formed on the general question, I hold that the deed of December 5, 1919, effectively conveyed the whole legal and equitable interest in the property to the vendor's predecessor in title. Section 45, sub-s. 6, of the Law of Property Act, 1925, makes the recitals, etc., in that deed sufficient evidence of the facts, etc., but there is ample contemporaneous proof (if such were needed) of the allegation in the penultimate recital that the personal representative of the mortgagor had, before the date of the deed, consented to the exercise by the vendors, parties thereto (being the personal representatives of the survivor of the mortgagees), of their statutory power of sale without any such application to the court as would otherwise have been required under the Act of 1914. The deed constitutes, in my judgment, an unexceptionable root of title.

A number of questions were argued before me which, in the view that I have formed and have now expressed, I need not attempt to answer. Mr. Roxburgh stated that, apart from the one point which I have decided, the purchasers are satisfied with the vendor's title so that whether their requisitions or any of them were out of time has become a matter of no importance. The question whether the vendor could, if the paper title had been defective, have obliged the

(1) [1916] W.N. 262.

purchasers to accept a possessory title does not, in my view of the case, arise, nor am I concerned with the validity or otherwise of any alleged or attempted repudiation or rescission of the contract. What would have been the rights of the parties in regard to the ten per cent. deposit paid on the signing of the contract in various possible eventualities might have involved some difficult problems. It has proved to be unnecessary for me to deal with them. I am reminded that the Act of 1939 has now been superseded by a later consolidating statute, but for convenience I have throughout this judgment assumed that the Act of 1939 is still in force.

The order which I propose to make is on the following lines: The purchasers by their counsel admitting that they have accepted the title of the vendor to the property agreed to be sold by the contract of June 24, 1943 mentioned in the pleadings save and except on the question relating to the deed of December 5, 1919 also therein mentioned to which the declaration next following relates. Declare that the said deed of December 5, 1919 operated as an effectual assurance of the property expressed to be thereby assured notwithstanding the omission to make any application under the Courts (Emergency Powers) Act, 1914 in regard to the sale intended to be thereby effected and that the said deed is a good and sufficient root of the plaintiff's title to the said property. And Declare that the said contract ought to be specifically performed and carried into execution And order and adjudge the same accordingly. On the question of costs I have not overlooked the submission of Mr. Roxburgh that the action was due to what he called the unreasonable conduct of the vendor's advisers in refusing to supply the purchasers with evidence of possession between the years 1920 and 1934. I do think that there was some lack of an accommodating spirit on each of the two sides, but I feel bound to look at what was, in my judgment, the basic error of the purchasers in raising and persisting in an objection to the title which was (as I have held) unfounded. I shall, therefore, order the purchasers to pay the costs of the action down to and including to-day, and the counterclaim must be dismissed with costs.

Solicitors: *Walters & Co.; W. C. Crocker.*

H. L. L.

COHEN,
EVERSHED
JJ.

1944

June 26;
July 17.

In re DEBTORS (Nos. 2 and 3 of 1944).

Emergency legislation—Bankruptcy—Petition—Stay—Inability "to pay "debts due to circumstances . . . . attributable to" war—Courts (Emergency Powers) Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 19), *s.* 1, *sub-s.* 5.

The debtors were directors of three companies which one of them had formed in 1942. In 1944 bankruptcy petitions were presented against the debtors who proved to the satisfaction of the county court registrar that their inability to pay the petitioning creditors' debts was due to circumstances attributable to the war. The registrar thereupon granted a stay of proceedings under s. 1, sub-s. 5, of the Courts (Emergency Powers) Act, 1943, so long as the debtors should pay to the petitioning creditors the amounts of their debts by four equal monthly instalments and also costs as in the order directed:—

Held, (1.) that, the debtors having proved to the satisfaction of the court that their inability to pay their debts was due to circumstances attributable to the war, the registrar was entitled to grant a stay under s. 1, sub-s. 5, although the material transactions had taken place, and the material obligations been entered into, after the outbreak of war; (2.) that the condition that the debts should be paid by four instalments was bad as constituting a preference of the petitioning creditors, and that the proper course was to impose a condition directing the debtors to pay into a special account a fixed sum every month and also any moneys that they might receive from realization of any of their assets; the application of the balance to the credit of that account being a question for the registrar when the matter came before him on an application to remove the stay.

APPEALS from Winchester county court.

The debtors were husband and wife. In 1942, the husband formed three companies, Wharf Hill Properties, Ld., Wharf Mills, Ld., and another. The debtors were directors of all three companies. To finance the companies the petitioning creditors lent 10,480*l.*, which was secured by a debenture of Wharf Hill Properties, Ld. and by monthly bills given by Wharf Mills, Ld., and guaranteed by the debtors. On some of those bills Wharf Mills, Ld. defaulted and the petitioning creditors brought four actions, two against Wharf Hill Properties, Ld. and the debtors and two against Wharf Mills, Ld. and the debtors. On February 3, 1944, they obtained judgment in two of the actions, and on February 14, 1944, two bankruptcy notices were served, one on the husband and the other on the wife. On February 22, 1944, the petitioning creditors obtained judgment in the two remaining actions. The debtors did not

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AND 3
OF 1944).

comply with the bankruptcy notices, and, on March 10, 1944, bankruptcy petitions were filed against them. On March 18, 1944, the wife, and, on March 28, 1944, the husband, gave notice of intention to apply for a stay of proceedings under s. 1, sub-s. 5, of the Courts (Emergency Powers) Act, 1943 (1). On April 12, 1944, the petitions came on for hearing and were adjourned to enable the debtors to file further evidence, the husband offering to pay the petitioning creditors' debts by monthly instalments. The petitions came on for hearing again on April 14 and April 21, 1944. The circumstances on which the debtors relied, as set out in the husband's evidence on affidavit, were that, as the petitioning creditors knew, the companies were formed to operate two contracts; that one of the contracts was worked for four months until frustrated by government restrictions; that the other was made impossible of performance at the profit anticipated by a government order forbidding the use of proprietary formulæ, and was later ended by government orders applying a zoning scheme and directing workers to other work; and that Wharf Mills, Ld. had to accept government work at a much lower rate of profit, and that it had, therefore, made very small profits and so could not meet the bills. On April 21, 1944, the registrar made an order in each case staying the proceedings so long as the debtor should pay to the petitioning creditors the amount of their debt by four equal monthly instalments beginning on May 21, 1944, and also the costs thereinafter ordered to be paid. The petitioning creditors appealed.

G. F. Kingham for the petitioning creditors. The registrar ought to have made receiving orders on these petitions, and the court is now asked to do so for this was not a proper case for a stay. The registrar was wrong in allowing the debtors to pray in aid events which occurred after the companies were formed in 1942, for the debtors must then have known perfectly well that any business which the companies might undertake must be subject to the risks of war. Now, simply because the businesses have been unsuccessful, the debtors claim the protection of the Act, and it ought not to be granted to them. Had the bankruptcy notices been served and not complied with before the outbreak of war, the debtors could not have prayed in aid events occurring after it, for the inability to pay debts referred to in the statute must be one which existed at the time when the debtor failed to comply with the bankruptcy notice : *In re a Debtor* (*No.* 13 *of* 1939) (1). The present is a stronger case in favour of the petitioning creditors than that case, for there the hazards of war had intervened. Even if, however, the registrar was entitled to grant the debtors a stay, their evidence is inadequate. The onus is on them to prove with the utmost strictness their inability to pay the debts and that it is due to circumstances attributable to the war : see *A.* v. *B.* (2) ; and that they have not done. In any case, the conditions on which the registrar granted the stay are wrong, and ought to be varied. The condition that the debts be paid by instalments cannot stand, for it amounts to a preference of the petitioning creditors : *In re a Debtor* (*No.* 2 *of* 1943) (3). In that case, a condition was imposed to prevent the debtor from wasting his assets, and here, if the stay is to stand, a like condition ought to be imposed.

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(1) By Courts (Emergency Powers) Act, 1943, s. 1, sub-s. 5: "Where a bankruptcy petition has "been presented against any "debtor . . . . and the debtor ". . . . proves to the satisfaction "of the court having jurisdiction in "the bankruptcy . . . . that his ". . . . inability to pay his . . . . "debts is due to circumstances "directly or indirectly attribut- "able to any war in which "His Majesty is engaged, the "court may at any time stay the "proceedings under the petition "for such time and subject to "such conditions as the court "thinks fit."

The debtors in person.

Cur. adv. vult.

1944. July 17. COHEN J. read the judgment of the court, in which he stated the facts, and continued : To avail themselves of s. 1, sub-s. 5, of the Courts (Emergency Powers) Act, 1943, the debtors must establish that their inability to pay is due to circumstances directly or indirectly attributable to the war. As the liability was incurred only in 1942, the debtors must show that the circumstances on which they rely arose after the date of the contract, since they clearly cannot rely on circumstances attributable to the war which were or should have been present to their minds at the time when they incurred the liability.

Mr. Kingham argued that, since the material transactions occurred, and the obligations in question were entered into in 1942, the events which subsequently occurred to defeat the debtors' expectations should be treated as arising from the inevitable risks of war and as such should have been present to the debtors' minds, and that, accordingly, the debtors ought not to be able to pray those events in aid, or, on the basis of those events to invoke the protection of the Courts (Emergency Powers) Act, 1943. We do not think this argument can be accepted. If accepted, the argument would lead, in effect, to the conclusion that the Act can have no application to cases of obligations entered into during the war—a conclusion, indeed, from which Mr. Kingham does not shrink—but this would be to add to the section of the Act words of qualification which are not there. In our judgment, there is no ground for saying that the section does not apply to cases of obligations, incurred during the war, provided the relevant circumstances are satisfactorily established by evidence.

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(1) [1940] Ch. 157.

(2) [1940] 1 K. B. 217, 225, 226, 227.

(3) Unrep. July 12, Dec. 13, 1943.

On what, then, do the debtors rely ? Reading the husband's affidavit with the notice of April 12, 1944, to the accuracy of which he swore on oath when examined before the registrar, the substance of his evidence is as follows : (1.) the companies were formed to the knowledge of the petitioning creditors to operate two contracts—(*a*) a cocoa grinding contract with E. Biggins & Co., Ld. ; (*b*) a contract with Messrs. Brand & Co., Ld., for manufacturing certain products according to proprietary formulæ. (2.) The first contract was worked satisfactorily for four months but was then frustrated by a series of government restrictions at first restricting and finally forbidding the use of cocoa in the bakery trade. (3.) The second contract was rendered impossible of performance at the anticipated profit by a government order forbidding the use of proprietary formulæ and was finally brought to an end as a result of further government orders applying a zoning scheme and directing trained girl workers to other work. (4.) In the result, the company was compelled to undertake government work at a much lower rate of profit than that obtainable under the original contracts. (5.) As an inevitable consequence the company has been able to make only a very small profit and was unable to meet its liabilities on the bills.

Now these allegations which were, we think, accepted as proved by the registrar, would be relevant to an application by the company under the Courts (Emergency Powers) Act, 1943, but would prima facie be irrelevant to an application by a guarantor of the company's debts. In the present case, however, the wife has sworn in her affidavit that the whole of her income is derived from the three companies, while the husband has exhibited a statement of their joint assets from which it appears that nearly the whole of his money is invested in shares in and loans to the companies, the only other assets disclosed being (*a*) household furniture and effects, valued at 1,500*l*., (*b*) a freehold property, 41, Wharf Hill, Winchester, charged to its full value, and (*c*) his residence at Southampton, the equity of redemption in which he values at 2,300*l*. Mr. Kingham points out that the husband admitted in the box that his banking account was not included in the statement and that the liability to the petitioning creditors was also not shown in the statement. Mr. Kingham, relying on the decision of the Court of Appeal in *A.* v. *B.* (1), says that the debtors must be meticulous in their disclosure and that as they have not been so, the application should have been dismissed. We agree that it was unfortunate that the statement was not more detailed, and that it did not distinguish the assets of the husband from those of the wife, but we see no reason to doubt that the substance of the matter was before the registrar. No objection appears to have been taken to his dealing with the two cases together and we can find in the registrar's note no sign of any suggestion on behalf of the petitioning creditors that the statement put in was defective except as to the omission of the banking account. Since the balance on that account appears to have been only 3*l*., we do not think we should attach importance to that omission. The full measure of the liability of the debtors to the petitioning creditors must, we think, have been present to the mind of the registrar, for, if their only liability had been that covered by the judgments, we do not think he would necessarily have found that they were unable to pay their debts, but, if their liability on bills not yet due is taken into account, it is clear that they were insolvent. In all the circumstances we do not think we should reverse the registrar's order on the ground of inadequate disclosure of assets and liabilities.

We have further come to the conclusion that we ought not to disturb the registrar's finding that the debtors had established that their inability to pay was due to circumstances arising out of the war. The freehold house is situate in a much

(1) [1940] 1 K. B. 217, 225, 226.

bombed area and may well not be readily realizable, and, apart from furniture, their only other assets were debts due from and shares in the companies. We think that there was evidence on which the registrar could properly come to the conclusion that these assets had been so depreciated by circumstances arising out of the war as to render the debtors unable to discharge their liability to the petitioning creditors. That being so and the question being one of fact, this court ought not to interfere with the registrar's conclusion, and it is immaterial whether we should have come to the same conclusion had we been adjudicating on the matter.

We turn, therefore, to the question whether the conditions on which the registrar granted a stay can be sustained. In our opinion, they cannot since the provision in the registrar's order for the payment of the petitioning creditors' debt by four instalments would amount to a preference of the petitioning creditors over the heads of the other creditors. This view is in accordance with an unreported decision of this court on July 12, 1943, in *In re a Debtor* (*No.* 2 *of* 1943) (1). On a later hearing in this court of the same case the court had to consider what conditions ought to be required if a stay were granted. It imposed conditions directed to preventing the debtor from dissipating his assets during the continuance of the stay. We think we should impose similar conditions in the present case. The details are a matter for discussion with counsel and the debtors, one of whom appears in person, but what we visualize is that a special account should be opened, preferably in the name of a responsible person, such as the petitioning creditors' solicitor, into which the debtors should pay a sum of x*l.* per month and also any moneys they may receive from a realization of any of their assets. The question of the application of the balance to the credit of that account will be for the registrar when the matter comes before him on an application to remove the stay, whether the purpose of such an application be a receiving order or the dismissal of the petition.

Solicitor for the petitioning creditors: *Sidney Pearlman.*

(1) Unrep. July 12 and Dec. 13, 1943.

K. R. A. H.

Applied. BANQUE DES MARCHANDS DE MOSCOU *v.* KINDERSLEY. [1950] 2 All E.R. 105.

Dictum of COHEN, J., at p. 409, *considered.* BANQUE DES MARCHANDS DE MOSCOU *v.* KINDERSLEY. [1950] 2 All E.R. 549.

COHEN
J.

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May 4;
June 12.

In re TOVARISHESTVO MANUFACTUR LIUDVIG-RABENEK.

Company—Winding up—Unregistered company—Place of business in Great Britain—Hotel—Russian company dissolved in Russia—Assets outstanding in England—Business carried on by directors at hotel in England—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 338, *sub-s.* 1 (*b*).

In 1879 a Russian company was established with its principal place of business at Moscow. From 1905 until 1914 directors of the company came to England and transacted its business at a hotel in this country. In 1920, owing to the revolution, the company was dissolved in Russia. In 1944, there being assets outstanding in England, a creditor presented a petition for the winding-up of the company. A question having arisen whether the court had jurisdiction to make the order:—

Held, that during the material periods the hotel was the place of business of the company in England, and that the directors had carried on business therefrom within the meaning of s. 338, sub-s. 1 (*b*), (*d*) (i.), of the Companies Act, 1929; and that the court had jurisdiction to make the order.

In re Lloyd Generale Italiano (1885) 29 Ch. D. 219, explained.

WINDING-UP PETITION.

In 1879 a company was established under the laws of Russia, having its principal place of business in Moscow. From 1905 until the outbreak of war in 1914 one or more of its directors came to England each year for a period varying from a few weeks to five months to conduct the affairs of the company in this country, and on each occasion stayed at and transacted business from the Midland Hotel, Manchester. In 1920, as a result of the revolution, the company ceased to be a legal entity in Russia. In 1944 it was alleged that the company had assets in England consisting of a claim to a sum of 34,257*l.* 6*s.* 11*d.*, stated to be held by Banque des Marchands de Moscou (Koupetschesky), now in liquidation, as trustee for the company. A petition was presented by the legal personal representatives of a creditor for the winding-up of the company as an unregistered company under Part X of the Companies Act, 1929, it being contended that the court had jurisdiction to make the winding-up order on the ground that the hotel was, under s. 338, sub-s. 1 (*b*), of that Act (1), a place of business in this country at which the agents of the company had conducted its affairs.

Pennycuick for the petitioners. The court has jurisdiction to make the winding-up order. The company formerly carried on business in England. It has ceased to carry on business in England, but it has assets in England, and the petitioners have a bona fide claim justifying the presentation of the petition. In presenting a petition it is not necessary for a creditor to establish that a company has a place of business in England: see *Dunlop Pneumatic Tyre Co.* v. *A.G. für Motor und Motorfahrzeugbau vorm. Cudell & Co.* (2); *The Lalandia* (3).

H. L. Parker for the Crown. To establish the jurisdiction of the court it must be shown that the company is not only carrying on business in this country, but is carrying it on at a place of business in this country within the meaning of s. 343 of the Act. The circumstances under which this company carried on business do not entitle the petitioners to a winding-up order. The phrase "ceased to carry on business" in s. 338, sub-s. 1 (*d*) (i.), means "ceased to carry on business from "a place of business" In each of the following authorities the company has had a place of business in the form of an office in this country, showing either the name of the company or that the business was being carried on there by an agent of the company: *In re Commercial Bank of India* (4); *In re*

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(1) By Companies Act, 1929, s. 338, sub-s. 1: "Subject to the "provisions of this Part of this "Act, any unregistered company "may be wound up under this "Act, and all the provisions of "this Act with respect to winding "up shall apply to an unregistered "company, with the following "exceptions and additions . . . . "(*b*) An unregistered company "shall, for the purpose of determining the court having jurisdiction in the matter of the "winding up, be deemed to be "registered in England or Scotland, according as its principal "place of business is situate "in England or Scotland, or if "it has a principal place of "business situate in both "countries, to be registered in both "countries and the principal place "of business situate in that part "of Great Britain in which proceedings are being instituted "shall, for all the purposes of the "winding up, be deemed to be the "registered office of the company ". . . . (*d*) The circumstances in "which an unregistered company "may be wound up are as "follows:—(i.) If the Company is "dissolved, or has ceased to carry "on business, or is carrying on "business only for the purpose of "winding up its affairs; . . . ."

(2) [1902] 1 K. B. 342.

(3) [1933] P. 56, 61.

(4) (1868) L. R. 6 Eq. 517.

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Matheson Brothers, Ld. (1); *In re Lloyd Generale Italiano* (2); and *In re Commercial Bank of South Australia* (3). This argument is borne out by r. 28 of the Companies (Winding-up) Rules, 1929: see also *In re Tea Trading K. & C. Popoff Brothers* (4). Moreover, this company on the facts was not "carrying on business" within the meaning of s. 338, sub-s. 1 (*d*) (i.). The true meaning of those words is that some real business is being transacted, whereas the directors were merely buying machinery and raw material for shipment to Russia.

Pennycuick replied.

Cur. adv. vult.

June 12. COHEN J. read a judgment in which he stated the facts and continued: The petition was originally presented against the company described by a translation of its Russian name. Pursuant to the direction of Uthwatt J., the petition was amended by describing the company by its correct Russian name and re-served. Notice was given to the Treasury Solicitor, as representing the Crown who, if the company has been dissolved, would or might be entitled to the assets of the company as bona vacantia. This direction was given in order that the court might have argument as to its jurisdiction to make the order for which the petitioners ask. As a result, I have had the advantage of a full argument by Mr. Pennycuick for the petitioners, and Mr. Parker for the Treasury Solicitor.

The petitioners seek to wind up the company as an unregistered company under Part X of the Companies Act, 1929. There is no doubt that it is, or was, an "unregistered "company" within the meaning of s. 337. That being so, the petitioners allege that I have jurisdiction to wind it up under s. 338.

Sub-s. 1, so far as material provides: [His Lordship read sub-s. 1, as above set out and continued]:

Sub-s. 2 provides: "Where a company incorporated outside "Great Britain which has been carrying on business in Great "Britain ceases to carry on business in Great Britain, it may "be wound up as an unregistered company under this part of "this Act, notwithstanding that it has been dissolved or "otherwise ceased to exist as a company under or by virtue "of the laws of the country under which it was incorporated."

(1) (1884) 27 Ch. D. 225.

(2) (1885) 29 Ch. D. 219.

(3) (1886) 33 Ch. D. 174.

(4) [1933] Ch. 647.

Sub-s. 2 of that section, I pause to mention, is a new provision first introduced by the Companies Act, 1928, s. 91, and is made obligatory under the Companies Act, 1929.

Mr. Pennycuick says, and I think correctly, that to bring the case within the section he has to establish that the company formerly carried on business in England, that it has been dissolved or ceased to carry on business in England, that it has assets within the jurisdiction, and that the petitioners have a claim, not necessarily a valid claim, but a claim that is not on the face of the petition demurrable, against the company.

I will dispose first of the last two points. The alleged asset is not admitted by the Russian Bank, but I have no evidence to suggest that it is not a genuine claim, and, if this were the only point, I should have no hesitation in making the order. The petitioners' claim falls into two parts. A rouble debt has, apparently, been extinguished by a Russian decree, but this would not, I think, affect the sterling debt: and, although that may be a disputed debt and the evidence in support of it is rather shadowy, I do not think that the general rule that a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by a company applies to the case of a petition against a Russian company which has been subjected to the decrees to which I have referred, since an action in this country to establish the debt would be impossible. In reaching this conclusion I am supported by the decisions of Bennett J. in *In re Russian & English Bank* (1), and Maugham J. *In re Russian Bank for Foreign Trade* (2). The second of Mr. Pennycuick's points can be readily disposed of as counsel are agreed that if the company ever carried on business in England it had ceased to do so long before the presentation of the petition.

The case resolves itself into the single issue: Did the company ever carry on business in England? I must, of course, approach this question from the standpoint that s. 338 of the Companies Act, 1929, in asserting jurisdiction to wind-up a foreign company which has been dissolved or ceased to carry on business in England, is going beyond the general principle of jurisdiction, which is, to quote the words of Lord Selborne in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (3), "that the plaintiff must sue in the court to which the

(1) [1932] 1 Ch. 663.

(2) [1933] Ch. 745.

(3) [1894] A. C. 670, 683.

"defendant is subject at the time of suit ('Actor sequitur "'forum rei'); which is rightly stated by Sir Robert Phillimore (International Law, Vol. 4, s. 891) to 'lie at the root "'of all international, and of most domestic, jurisprudence on "'this matter.' All jurisdiction is properly territorial, and "'extra territorium jus dicenti, impune non paretur.' Territorial jurisdiction attaches (with special exceptions) upon all "persons either permanently or temporarily resident within "the territory while they are within it; but it does not "follow them after they have withdrawn from it, and when "they are living in another independent country." I must be careful, therefore, not to place a wider interpretation on the section than the context justifies.

Mr. Parker invites me to hold that, on its true construction, the section requires that the company must have had an established place of business within the jurisdiction, that is, that the company must have had an office of its own in this country of which it was either the tenant or which could, in the light of the surrounding circumstances, properly have been regarded as its permanent office. In other words, he says that a company, which has been dissolved or ceased to carry on business in this country, cannot be wound up under s. 338 unless it had established a place of business within Great Britain within the meaning of s. 343. I am unable to accept this argument. I respectfully agree with the observations of the Lord President in *Lord Advocate* v. *Huron and Erie Loan & Savings Co.* (1) that "when the legislature selected the phrase "'establishes a place of business' it means something other "than 'carrying on business.'" The Lord President was commenting on an attempt to induce him to construe the phrase "establishes a place of business" in s. 343 of the Companies Act, 1929, in the light of the decisions on "carrying "on business" in other statutes. His observations seem to me to apply with still greater force to a change of language in the same statute. Where the legislature intended to make the possession of an established place of business a condition of the application of any particular provision, it has said so. For example, in Part XI, where the possession of such a place of business is the essential condition of the application of that Part of the Act to a company incorporated outside Great Britain, and in s. 145 defining which companies incorporated outside Great Britain must comply with the requirements of

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(1) 1911 S. C. 612, 616.

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the Act as regards particulars with respect to directors to be included in trade catalogues, etc. The legislature did not use this phrase in s. 338. Had it been intended to confine the application of that section to companies with an established place of business it would have been easy so to provide by adding a sub-section to the effect that "no unregistered "company shall be wound up under this Act unless it has or "has had an established place of business in Great Britain." The legislature did not think fit so to provide, and I do not think I should be justified in reading any such limitation into the section.

I think, however, that the language of s. 338, sub-s. 1, itself involves some limitation on the very general words "carrying on business." These words, as pointed out by the Lord President in the case cited, would cover such activities as touting for loans and for this purpose employing agents in this country, but the provisions of s. 338, sub-s. 1, in my opinion, make it clear that an unregistered company cannot be wound up under Part X of the Act unless it has a place, not an established place, of business in Great Britain, for, unless it has such a place of business, no question can arise whether the place of business in England or the place of business in Scotland is the principal place of business.

What then is the test whether the company has a place of business in this country? This must, I think, vary according to the nature of the company's business, but I derive some assistance from cases which have been decided under R. S. C., Or. 9, r. 8, where the question has been whether the company on which a writ was alleged to have been served was resident within the jurisdiction at the time of service. In cases of this class there is no question of the courts of this country seeking to enforce jurisdiction over persons not resident here. The relevancy of the cases is that the test of residence has been held to be whether the company was carrying on business in this country at the time of service. My attention was called to two of such cases. It will be sufficient for the moment if I refer to *Dunlop Pneumatic Tyre Co.* v. *A.G. für Motor und Motorfahrzeugbau vorm. Cudell & Co.* (1). In that case "The defendants, a foreign corporation, "who were manufacturers of motor-cars abroad, hired a "'stand' at the Crystal Palace for the exhibition of articles "of their manufacture at a cycle show, and exhibited at the

(1) [1902] 1 K. B. 342.

"show, which lasted for nine days, among other articles, "a motor-car fitted with tyres, which were alleged by the "plaintiffs to be an infringement of their patent. The "defendants' 'stand' was in charge of a person employed by "them as their representative, whose duty it was to explain "the working of the articles exhibited, and to take orders for "and press the sale of the defendants' goods." The writ was served on that representative or his assistant and the Court of Appeal held that the service was valid, as the defendants were carrying on business so as to be resident within the jurisdiction. Romer L.J. states the law (1) in these words: "The result of the authorities appears to me to be that, if "for a substantial period of time business is carried on by a "foreign corporation at a fixed place of business in this "country, through some person, who there carries on the "corporation's business as their representative and not merely "his own independent business, then for that period the "company must be considered as resident within the "jurisdiction for the purpose of service of a writ." I think that is a reasonable test to apply under s. 338, sub-s. 1. It is not necessary for me to consider whether, applying it, I should have reached the same conclusion as that reached by the Court of Appeal on the facts of that case, but I feel no doubt that, applying this test to the facts of the present case, the company was carrying on business within the jurisdiction within s. 338, sub-s. 1. For nine consecutive years directors of this company visited England and bought machinery and raw cotton, the acquisition of which was essential to the transaction of their business. Their visits each year extended over a period of anything from a few weeks to five months. They stayed on each occasion at the Midland Hotel, Manchester, and transacted business therefrom. I think I should be defeating the object of the legislature if I were not to hold that the Midland Hotel was, during the periods in question, the place of business in England of the respondent company and that they carried on business therefrom.

What was the object of the legislature? Clearly, I think, to ensure that, if a company carried on business in this country, incurring, as it must do, liabilities to creditors in this country, its assets in England should be available for its creditors even though it was dissolved in its country of origin or ceased to carry on business here. If this be the object, it would clearly

(1) [1902] 1 K. B. p. 349.

be defeated if a company could send members of its board of directors regularly to this country who carry on a substantial volume of business and then escape the consequences of so doing on the ground that it had not leased premises but had transacted its business from an hotel.

It was argued that the conclusion at which I have arrived is inconsistent with the only reported decision on the subject *In re Lloyd Generale Italiano* (1). The headnote is in these terms: "There is no jurisdiction under the Companies Act, "1862, to wind-up a foreign company which has carried on "business in England by means of agents, but which has no "branch office of its own there." This headnote certainly supports the argument, but it does not follow or sufficiently state the facts. From the statement of facts it appears that the company had carried on business in Italy and also in England, the business there being transacted by means of agents. The company had no branch office of its own in England. There were a number of creditors in England but the company had no assets there. On these facts Pearson J. dismissed the petition saying: "In my opinion I have no "jurisdiction to make a winding-up order, however convenient "it might be that such an order should be made. I should be "making an order for which there is no precedent and no "authority. This company is established at Genoa, and it "carries on business there. It has agents in England, and "nothing but agents, and it has carried on business here "through those agents, in the same way as foreign merchants "often carry on business in this country by means of agents. "The jurisdiction to wind up a company is a purely statutory "one under the Companies Acts. If I were to adopt "Mr. Farwell's argument, I must come to the conclusion "that, in every case in which a foreign company has had any "dealings in this country—whether the company is established "in China, or Japan, or Australia—there is jurisdiction to "order it to be wound up. I am decidedly of opinion that the "Act is confined to English companies, and foreign companies "carrying on business in England with, so to speak, a residence "of their own—a branch office—in this country. In the cases "which have been cited of orders made to wind up foreign "companies, the companies had an office in England, but "that is not so in the present case." As to the correctness of the decision there can, I think, be no doubt, for the company

(1) 29 Ch. D. 219, 220.

had no assets here and there was nothing to administer. If and so far as it purports to suggest that an established place of business is a necessary ingredient in founding jurisdiction, I venture respectfully to differ, but I do not think this is the proper reading of the judgment. The statement of facts indicates that the company was transacting business, not by, but through, agents in this country. If so, there would clearly be no jurisdiction: see *The Lalandia* (1). I do not think Pearson J.'s observations were intended to cover a case such as the present, where the company, instead of employing agents in England, sends members of its board of directors to England each year for nine consecutive years to transact a substantial volume of business in England. A company can only carry on business by or through agents, and I cannot resist the conclusion that on the facts of the present case this company has carried on business in this country within s. 338, sub-s. 1.

My attention was called to three unreported cases, two of which were alleged to support the petitioners and one to be fatal to them. I cannot rely on the two cases alleged to be in their favour as in the first of them, *Industrial & Commercial Co. Vladimir Alexeew* (2), Eve J. appears to have accepted the view that the company had an established place of business in England, while, in the second, *Banque des Marchands de Moscou* (*Koupetschesky*) (3), the same learned judge based his judgment on the fact that, whether rightly or wrongly, the name and address of a person authorized to accept service was on the register under s. 274 of the Companies (Consolidation) Act, 1908, which corresponds to s. 344 of the Companies Act, 1929. Nor can I treat the other case, *In re Moscow Industrial Bank* (4) as authority binding me to dismiss the petition, since the main ground of the decision was that the evidence both of the facts alleged to entitle the petitioner to an order and of service of the petition were defective. It is true that Bennett J. says that, even if the facts had been proved, the fact that for two or perhaps three years the bank employed an agent in this country to buy wool does not lead to the conclusion that the company carried on business within the jurisdiction. So far as I know, there was no place in this country which anybody regarded as an office of the respondent bank, or, at least, the evidence does not say that there was, but the facts

(1) [1933] P. 56.

(2) Unrep.

(3) Unrep.

(4) Unrep.

there alleged fell far short of what is proved in this case and I cannot treat it as authority binding me to hold that, to succeed, the petitioners must establish facts which would have brought the company within Part XI of the Act as having an established place of business.

I have so far considered only s. 338, sub-s. 1. I do not think sub-s. 2 affects the position. I respectfully agree with the observations of Bennett J. in *In re Russian & English Bank* (1), that this sub-section was not intended to alter the law as it had been decided to be under the Acts of 1862 and 1908. I should add that this view is further supported by the observations of Lord Atkin in *In re Russian & English Bank* (2), where his Lordship said: "I for myself come to the con-"clusion that s. 91 of the Act of 1928 was introduced as "s. 338, sub-s. 2, into the Act of 1929 for the removing of "doubts and to make it clear that the words 'if the company "'is dissolved' were meant to apply to an incorporated "company dissolved according to the law of its constitution, "and not intended to give a new enabling power only "applicable to a company which should cease to carry on "business after the passing of the Act."

In the result I must make the order for which the petitioners ask, but, in case it should finally be held that the company was dissolved and that, as a result, its assets are vested in the Crown by way of bona vacantia, I must follow the precedent set by Eve J. in the *Alexeew* case (3) and insert in the order words saving the rights (if any) of the Crown to the assets as bona vacantia.

Solicitors: *Denton, Hall & Burgin; Treasury Solicitor.*

(1) [1932] 1 Ch. 663, 669.
(2) [1936] A. C. 405, 424.
(3) Unrep.

J. L. D.

END OF VOL. AND OF CHANCERY SERIES FOR 1944.

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